No. 4084

United States
Circuit Court of Appeals
For the Ninth Circuit.

ANTHONY CARNEY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4084

United States
Circuit Court of Appeals
For the Ninth Circuit.

ANTHONY CARNEY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

Names and Addresses of Attorneys of Record.

BURTON K. WHEELER, Butte, Montana,

JAMES H. BALDWIN, Butte, Montana,

Attorneys for Plaintiff in Error.

JOHN L. SLATTERY, United States District Attorney,

RONALD HIGGINS, Asst. United States District Attorney,

W. H. MEIGS, Assistant United States District Attorney,

Attorneys for Defendant in Error. [1*]

In the District Court of the United States in and for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Be it remembered that on the 26th day of May, 1922, an information was filed herein, which information is in the words and figures as follows, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, District of Montana, Butte Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Information.

BE IT REMEMBERED, that John L. Slattery, United States Attorney for the District of Montana, who, for the said United States, in its behalf, prosecutes in his own person, comes here into the District Court of the United States for the District of Montana, on the 26th day of May, 1922, in the February, 1922, term of said court, held at the city of Butte, in the State and District of Montana, and for the United States of America gives the Court to understand and be informed:

That on or about the 18th day of April, 1922, one Anthony Carney, whose true name is to the informant unknown, at and within certain premises situated at 205 W. Quartz St., in the city of Butte, in the county of Silver Bow, in the State and District of Montana, and within the jurisdiction of this court, did then and there wrongfully and unlawfully manufacture intoxicating liquor, to wit, moonshine whiskey, the exact character and quantity of which is to the informant unknown, without then and there first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary

to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the informant aforesaid further gives the Court to [3] understand and be informed:

That on or about the 18th day of April, 1922, said Anthony Carney, whose true name is to the informant unknown, at and within certain premises situated at 205 W. Quartz St., in the city of Butte, in the county of Silver Bow, in the State and District of Montana, and within the jurisdiction of this court, did then and there wrongfully and unlawfully manufacture intoxicating liquor, to wit, moonshine whiskey, the exact character and quantity of which is to the informant unknown, without making at the time a permanent record of such manufacture, showing in detail the amount and kind of liquor manufactured and the time and place of manufacture; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 18th day of April, 1922, said Anthony Carney, whose true name is to the informant unknown at and with certain premises situated at 205 W. Quartz St., in the city of Butte, in the county of Silver Bow, in the State and District of Montana, and within the jurisdiction of this court, did then and there wrongfully and unlawfully

have and possess intoxicating liquor intended for use in violation of Title II of the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

FOURTH COUNT.

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 18th day of April, 1922, said Anthony Carney, whose true name is to the informant unknown, at [4] and with certain premises situated at 205 W. Quartz St., in the city of Butte, in the county of Silver Bow, in the State and District of Montana, and within the jurisdiction of this court, did then and there wrongfully and unlawfully have and possess property designed for the manufacture of intoxicating liquor, intended for use in violation of Title II of the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

FIFTH COUNT.

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 18th day of April, 1922, said Anthony Carney, whose true name is to the informant unknown, at and within certain premises situated at 205 W. Quartz St., in the city of Butte, in the county of Silver Bow, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully maintain a common nuisance, that is to

say, a place and building where intoxicating liquor was kept and manufactured in violation of Title II of the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

JOHN L. SLATTERY,
United States Attorney, District of Montana. [5]

United States of America,
District of Montana,—ss.

John L. Slattery, being first duly sworn, on oath, deposes and says:

That he is the duly appointed, qualified and acting United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he has read such information, and knows the contents thereof, and that the matters and things stated are true to the best of his knowledge, information and belief.

JOHN L. SLATTERY.

Subscribed and sworn to before me this 25th day of May, 1922.

L. R. POLGLASE,
Deputy Clerk, United States District Court, District of Montana.

Filed May 26, 1922. C. R. Garlow, Clerk.

And thereafter on May 26, 1922, the affidavits of Charles Rodda and Sam Fairchild were filed herein, which is entered of record as follows, to wit: [6]

In the District Court of the United States in and for the District of Montana.

Butte, Montana, April 29, 1922.

UNITED STATES

vs.

ANTHONY CARNEY.

Affidavits of Chas. Rodda and Sam Fairchild.

Chas. Rodda and Sam Fairchild, being first duly sworn according to law, depose and say:

That they are duly appointed, qualified and acting police officers of the city of Butte, Montana, and were such on the 18th day of April, 1922.

That during day of April 18, 1922, man known to them as Fred Bolton, and employed by the Montana Gas Co. came to them and complained that at certain premises, 205 W. Quartz St., Butte, Montana, he was refused admission to premises, for the purpose of reading gas meter.

That they went with man to premises 205 W. Quartz St., and upon entering noticed a very strong odor of mash, that upon investigation they discovered 75 gallon mash, in a state of fermentation, a quantity of white moonshine whiskey, one 12 gallon still and connections.

That they then arrested Anthony Carney, and brought him to Police Station. Anthony Carney

being owner of premises, occupying same, and having full control of same.

Sample of mash and whiskey turned over to the Federal Prohibition Department at Butte, Mont., together with still and connections.

CHARLES RODDA.
SAM FAIRCHILD.

Subscribed and sworn to before me this 9th day of May, 1922.

F. J. DALLMAN,
Deputy Collector of Internal Revenue.

Filed May 26, 1922. C. R. Garlow, Clerk. [7]

In the District Court of the United States in and for the District of Montana.

United States of America,
District of Montana,—ss.

AFFIDAVIT.

Charles Rodda and Sam Fairchild, after each being first duly sworn, upon his oath, according to law, deposes and says as follows, to wit:

That they are duly appointed, qualified and acting police officers of the city of Butte, Montana, and were such on the 18th day of April, 1922;

That while engaged in the dispatch of their official duties they were at those premises situated at 205 West Quartz Street, in the city of Butte, and found therein a 12 gallon still, together with the equipment used in connection with the operation of the same, set up and in operation, and also

found Anthony Carney in charge of the said premises engaged in the operation of the said still, and in the manufacture of intoxicating liquors.

CHARLES RODDA.
SAM FAIRCHILD.

Subscribed and sworn to before me this 24th day of May, 1922, Butte, Montana.

F. J. DALLMAN,
Deputy Collector U. S. I. R. S.

Filed May 26, 1922. C. R. Garlow, Clerk.

And thereafter on May 26th, 1922, an order was entered herein, which order is of record as follows, to wit: [8]

In the District Court of the United States in and for the District of Montana.

No. 921.

UNITED STATES
vs.
ANTHONY CARNEY.

Order Granting Leave to File Information and Affidavit.

On motion of the District Attorney, information and affidavit in support thereof ordered filed herein. The case belonging to the Butte Division, and defendant now on bond, it is ordered that he appear for arraignment at Butte, Montana, on May 29th, 1922, at 9:30 A. M.

Entered in open court May 26, 1922.

C. R. GARLOW,
Clerk.

And thereafter on May 29, 1922, the minute entry on the arraignment of the defendant was entered herein, which entry is of record as follows, to wit: [9]

In the District Court of the United States in and for the District of Montana.

No. 921.

UNITED STATES
vs.
ANTHONY CARNEY.

Arraignment.

Defendant present in court and being arraigned, he answered that his true name is Anthony Carney. Thereupon B. K. Wheeler, Esq., asked that the names of Wheeler & Baldwin be entered as attorneys for defendant and it was so ordered. Thereupon defendant waived the reading of the information and entered a plea of not guilty.

Entered in open court May 29, 1922.

C. R. GARLOW,
Clerk.

And thereafter on May 15, 1923, the verdict of the jury was entered herein, which verdict is of record as follows, to wit: [10]

In the District Court of the United States in and for the District of Montana.

Butte Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the information on file herein, as to Counts Three, Four and Five, and not guilty as to Counts One and Two.

HENRY WILLIAMS,
Foreman.

Filed May 15, 1923. C. R. Garlow, Clerk.

And thereafter on May 15, 1923, the record of trial of the defendant was entered herein, which record of trial is of record as follows, to wit: [11]

In the District Court of the United States in and for the District of Montana.

No. 921.

UNITED STATES

vs.

ANTHONY CARNEY.

Trial.

This cause came on regularly for trial this day, defendant being present with his attorney, J. H. Baldwin, Esq., and John L. Slattery, Esq., United States Attorney, appearing for the United States. Thereupon the following were duly impaneled, accepted and sworn as a jury to try the cause, viz.: J. W. Pyle, Jerry Shea, T. C. Hall, P. M. Joslin, Henry Williams, John T. Neal, Swend Carlson, A. C. Richie, Robert Quackenbush, Charles A. Hauswirth, John Thoney and A. F. Waldorf. Thereupon Fred Bolton, Charles Rodda and Sam Fairchild were sworn and examined as witnesses for the United States, and a certain still and jug of moonshine introduced, whereupon the United States rested. Thereupon defendant moved the Court to direct the jury to return a verdict of not guilty herein, for lack of proof, which motion was denied and exception of defendant noted. Thereupon Mrs. A. Carney, Mrs. Gannon, William Colmer, Martin Walsh, Joe Nevin and Anthony Carney, were sworn and examined as witnesses for defendant, and Charles Rodda recalled as a witness by defendant,

whereupon defendant rested. Thereupon Charles Rodda was recalled in rebuttal by plaintiff, whereupon plaintiff rested and the evidence closed. Thereupon, after the arguments of counsel and the instructions of the Court, the jury retired to consider of its verdict, the marshal being directed to furnish meals and lodging to the jurors engaged in the trial of said cause and to the two bailiffs in charge of said jury. Thereafter the jury returned into court with its verdict, which verdict was received by the Court, and ordered read and filed, and by the jury acknowledged [12] to be its true verdict, being as follows, to wit: "We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the information on file herein, as to counts Three, Four and Five, and not guilty as to counts One and Two. Henry Williams, Foreman." Thereupon Court ordered that time for sentence be continued until 9:30 A. M. tomorrow.

Entered in open court May 15, 1923.

C. R. GARLOW,
Clerk.

And thereafter on May 16, 1923, judgment was rendered and entered herein, which judgment is of record as follows, to wit: [13]

In the District Court of the United States in and for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Judgment.

The United States Attorney with the defendant and his counsel present in court.

The defendant was thereupon duly informed by the Court of the nature of the charge against him as appears in Counts 3, 4 and 5 of the information herein, and of his arraignment, and plea of not guilty, and of his trial and the verdict of the jury of guilty as to counts 3, 4 and 5 of the information.

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendant having been convicted in this court of the offense of unlawfully having and possessing intoxicating liquor and property designed for the manufacture of intoxicating liquor, intended for use in violation of the National Prohibition Act, and unlawfully maintaining a

common nuisance, in violation of the National Prohibition Act, committed on the 18th day of April, 1922, at Butte, in the State and District of Montana, as charged in counts 3, 4 and 5 of the information herein;

It is therefore considered, ordered, and adjudged that for said offense you, the said Anthony Carney be confined and imprisoned in [14] the county jail at Butte, Montana, for the term of seven months and that you pay a fine of Two Hundred and Fifty Dollars and costs taxed at $39.70, and that you be confined in said county jail until said fine is paid or you are otherwise discharged according to law. Thereupon, for good cause, Court ordered that commitment herein be stayed for 24 hours, pending the filing of a motion by defendant for a new trial.

Judgment rendered and entered May 16th, 1923.

[Seal] C. R. GARLOW,
Clerk.
By H. H. Walker,
Deputy.

And thereafter on May 17, 1923, motion for new trial was filed herein, which motion for new trial is of record as follows, to wit: [15]

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Motion for New Trial.

Comes now the defendant in the above-entitled action and moves as follows:

I.

That the verdict of guilty on the third count contained in the information on file herein on May 15, 1923, be set aside and a new trial on said count of the information allowed on the grounds and for the reasons following:

1. That the charge contained in said count of said information does not state facts sufficient to constitute a public offense.

2. That the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America.

3. That said third count of said information does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act.

4. That because the charge contained in said count of said information does not state facts suffi-

cient to constitute a public offense, the above-entitled court was and is without jurisdiction [16] to try the defendant on the charge contained in said count of said information.

5. That because the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

6. That because of the fact that said third count of said information does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

7. Errors in law occurring at the trial as follows:

The Court erred in overruling defendant's objections to the testimony given by the witness Van Orden relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in overruling defendant's objections to the testimony given by the witness Fairchild relating to conversations had by him with defendant's wife in the absence of the defendant.

The Court erred in admitting the testimony of the witness Van Orden concerning statements to

have been made by the defendant's wife concerning the necessity for and want of a search-warrant as the basis for searching the premises mentioned and described in the information herein.

The Court erred in denying defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in making the comment that it did make in overruling defendant's motion for a directed verdict at the conclusion of the Government's case. [17]

The Court erred in submitting the charge contained in said count of said information to the jury.

8. While charging the jury, the Court erred as follows:

In its definition of a reasonable doubt.

In its statement of the law relating to the presumption of innocence.

In failing to tell the jury that the presumption of innocence is an instrument of proof created by law in favor of one accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created.

That this presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

That this legal presumption of innocence is to be regarded by the jury in every case as matter of evi-

dence to the benefit of which the party charged with crime is entitled.

That the presumption of innocence is evidence in favor of the accused which must be borne in mind by the jury and considered by them with all of the other evidence in the case in arriving at their verdict.

That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

In charging that the presumption of innocence is merely a status created by law at the commencement of the trial.

That in failing to charge the jury that to overturn the presumption of innocence, there must be evidence of guilt carrying home a degree of conviction short only of absolute certainty. [18]

In stating that a statement said to have been made by the defendant's wife in his absence, concerning the necessity of a search-warrant authorizing the searching of the premises as described in the information herein, was an admission of guilty knowledge, from which the jury might infer that the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

In stating that the evidence was such as to require the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

That in stating that the jury had a perfect right to infer from the evidence that the defendant and Joe O'Donnell were partners in connection with the matters charged in said count of said information.

In stating that the defendant testified that he did not know anything about the search of the premises described in the information until he was told about it by the officers at the time they arrested him.

In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

In using the word "bamboozled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury, and to cause the jury in arriving at [19] their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury and were not worthy of any credit whatsoever.

In using the word "hoodwinked" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and were not worthy of any credit whatsoever.

In using the word "gulled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked,

and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and were not worthy of any credit whatsoever.

In failing to state definitely the elements essential [20] to the commission of the crime charged to have been committed in the third count of the information.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the third count of the information.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the third count of the information would be justified.

In charging generally on all of the counts contained in the information herein and definitely on none.

In submitting the charge contained in the third count of the information and the charge contained in the fifth count of the information for the reason that as a result thereof defendant was twice put in jeopardy for the same offense.

In failing to instruct the jury:

That circumstantial evidence should be acted upon with caution.

That before a conviction can properly be had on circumstantial evidence, all the essential facts must be consistent with the hypothesis of guilt as that is to be compared with all the facts proved.

That the facts must exclude every other theory but that of guilt and that the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself. [21]

9. That the evidence is insufficient to justify the verdict of guilty on said count of said information for this:

That there is nothing in the evidence showing or tending to show to whom the liquor said to have been found in the premises described in the information herein, belonged.

That there is nothing in the evidence tending to show that the liquor mentioned in said count of said information belonged to the defendant.

That there is nothing in the evidence tending to show, how, when or by whom the liquor mentioned in said count of said information was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was ever the owner of, in possession of, or in control of said

liquor, or that he had any knowledge concerning its existence, or the place where it was kept.

That there is nothing in the evidence tending to show that if the liquor mentioned in said count of said information belonged to the defendant, he was not legally permitted to possess the same,

That unless it be conceded that the testimony given on the part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found, is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing in the evidence tending to show that said liquor was not kept in defendant's private dwelling for the personal consumption of the defendant and his family residing in such dwelling and to his *bona fide* guests when entertained by him therein.

That if it be conceded that the testimony given on the part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing [22] in the evidence tending to show that the defendant had any knowledge of, title to, or control over such liquor.

That there is nothing in the evidence tending to show that the liquor mentioned in the third count of said information and stated to have been intended for use in violation of Title II of the National Prohibition Act was kept in the premises

mentioned in said information for sale, barter or any other commercial purpose.

That there is nothing in the evidence tending to show that any intoxicating liquor had ever been sold, bartered or used for any commercial purpose in or on the premises described in the information herein or by the defendant at any time or place.

II.

That the verdict of guilty on the fourth count contained in the information on file herein on May 15, 1923, be set aside and a new trial on said count of the information allowed on the grounds and for the reasons following:

1. That the charge contained in said count of said information does not state facts sufficient to constitute a public offense.

2. That the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America.

3. That because of the charge contained in said count of said information does not state facts sufficient to constitute a public offense, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

4. That because the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information. [23]

7. Errors in law occurring at the trial as follows:

The Court erred in overruling defendant's objections to the testimony given by the witness Van Orden relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in overruling defendant's objections to the testimony given by the witness Fairchild relating to conversations had by him with defendant's wife in the absence of the defendant.

The Court erred in admitting the testimony of the witness Van Orden concerning statements to have been made by the defendant's wife concerning the necessity for and want of a search-warrant as the basis for searching the premises mentioned and described in the information herein.

The Court erred in denying defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in making the comment it did make in overruling defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in submitting the charge contained in said count of said information to the jury.

8. While charging the jury, the Court erred as follows:

In its definition of a reasonable doubt.

In its statement of the law relating to the presumption of innocence.

In failing to tell the jury that the presumption of innocence is an instrument of proof created by law in favor of one accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created.

That this presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion [24] of his guilt or innocence is to be drawn.

That this legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party charged with crime is entitled.

That the presumption of innocence is evidenced in favor of the accused which must be borne in mind by the jury and considered by them with all of the other evidence in the case in arriving at their verdict.

That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

In charging that the presumption of innocence is merely a status created by law at the commencement of the trial.

That in failing to charge the jury that to overturn the presumption of innocence, there must be evidence of guilt carrying home a degree of conviction short only of absolute certainty.

In stating that a statement said to have been made by the defendant's wife in his absence, concerning the necessity of a search-warrant authorizing the searching of the premises described in the information herein, was an admission of guilty knowledge, from which the jury might infer that the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

In stating that the evidence was such as to require that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matter charged in said count of said information.

That in stating that the jury had a perfect right to infer from the evidence, that the defendant and Joe O'Donnell were [25] partners in connection with the matters charged in said count of said information.

In stating that the defendant testified that he did not know anything about the search of the premises described in the information until he was told about it by the officers at the time they arrested him.

In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

In using the word "bamboozled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason

that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury and were not worthy of any credit whatsoever.

In using the word "hoodwinked" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true [26] facts from the jury and had been guilty of perjury, and were not worthy of any credit whatsoever.

In using the word "gulled" in connection with its comment concerning the testimony given by the

witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them victims of trickery and deceit practiced by defendant's witnesses upon them, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and were not worthy of any credit whatsoever.

In failing to state definitely the elements essential to the commission of the crime charged to have been committed in the fourth count of the information.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the fourth count of the information.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the fourth count of the information would be justified.

In charging generally on all of the counts con-

tained in the information herein and definitely on none.

In failing to instruct the jury:

That circumstantial evidence should be acted upon with caution.

That before a conviction can properly be had on circumstantial [27] evidence, all the essential facts must be consistent with the hypothesis of guilt as that is to be compared with all the facts proved.

That the facts must exclude every other theory but that of guilt and that the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself.

9. That the evidence is insufficient to justify the verdict of guilty on said count of said information for this:

That there is nothing in the evidence showing or tending to show to whom the property, stated in said count of the information, to be designed for the manufacture of intoxicating liquor intended for

use in violation of Title II of the National Prohibition Act, belonged.

That there is nothing in the evidence tending to show that the property mentioned in said count of said information belonged to the defendant.

That there is nothing in the evidence tending to show how, when or by whom the property mentioned in said count of said information was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was ever the owner of, in possession of, or in control of said property, or that he had any knowledge concerning its existence, or the place where it was kept. [28]

That it appears from the testimony that the room in which said property is stated to have been found had been rented to a person other than the defendant and there is nothing in the evidence tending to show that the defendant had any knowledge of, title to, or control over such property.

That there is nothing in the evidence tending to show that said property had been used for the manufacture of any intoxicating liquor.

That there is nothing in the evidence tending to show that said property was ever used on the premises described in the information herein for the purpose of manufacturing any intoxicating liquor for sale, barter or any other purpose or otherwise or at all.

That there is nothing in the evidence tending to show that any intoxicating liquor had ever been sold, bartered or used for any commercial purpose

in or on the premises described in the information herein or by the defendant at any time or place.

III.

That the verdict of guilty on the fifth count contained in the information on file herein on May 15, 1923, be set aside and a new trial on said count of the information allowed on the grounds and for the reasons following:

1. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act is concerned, the charge contained in said count of said information does not state facts sufficient to constitute a public offense.

2. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act is concerned, the facts stated in said count of said information are not sufficient to show a violation [29] of any criminal law of the United States of America.

3. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act is concerned, the fifth count of said information does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited

and unlawful" as required by Section 32 of the National Prohibition Act.

4. That because in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act, the same does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information, that he maintained a nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

5. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act is concerned, by their verdict of not guilty on the first and second counts contained in said information, the jury found the issue framed by defendant's plea of not guilty to the charge last mentioned in favor of the defendant, and the Government is now foreclosed from contending that the defendant was guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor [30] was man-

ufactured in violation of Title II of the National Prohibition Act.

6. Errors in law occurring at the trial as follows:

The Court erred in overruling defendant's objection to the testimony given by the witness Van Orden relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in overruling defendant's objection to the testimony given by the witness Fairchild relating to conversations had by him with defendant's wife in the absence of the defendant.

The Court erred in admitting the testimony of the witness Van Orden concerning statements having been made by the defendant's wife concerning the necessity for and want of search-warrant as the basis for searching the premises mentioned and described in the information herein.

The Court erred in denying defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in making the comment that it did make in overruling defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in submitting either of the charges contained in said count of said information to the jury.

7. While charging the jury the Court erred as follows:

In its definition of a reasonable doubt.

In its statement of the law relating to the presumption of innocence.

In failing to tell the jury that the presumption of innocence is an instrument of proof created by law in favor of one accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created. [31]

That this presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

That this legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party charged with crime is entitled.

That the presumption of innocence is evidence in favor of the accused which must be borne in mind by the jury and considered by them with all of the other evidence in the case in arriving at their verdict.

That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

In charging that the presumption of innocence is merely a status created by law at the commencement of the trial.

That in failing to charge the jury that to overturn the presumption of innocence, there must be

evidence of guilt carrying home a degree of conviction short only of absolute certainty.

In stating that a statement said to have been made by the defendant's wife in his absence, concerning the necessity of a search-warrant authorizing the searching of the premises described in the information herein, was an admission of guilty knowledge, from which the jury might infer that the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

In stating that the evidence was such as to require the inference that the defendant was a partner of Joe O'Donnell in connection with the matters charged in said count of said information. [32]

In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

That in stating that the jury had a perfect right to infer from the evidence that the defendant and Joe O'Donnell were partners in connection with the matters charged in said count of said information.

In stating that the defendant testified that he did not know anything about the search of the premises described in the information until he was told about it by the officers at the time they arrested him.

In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

In using the word "bamboozled" in connection with its comment concerning the testimony given

by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury and were not worthy of any credit whatsoever.

In using the word "hoodwinked" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true [33] facts from the jury and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and were not worthy of any credit whatsoever.

In using the word "gulled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and were not worthy of any credit whatsoever.

In failing to state definitely the elements essential to the commission of the crime of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

In failing to state definitely the elements essential to the commission of the crime of maintaining a

common nuisance, [34] that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt, before a verdict finding the defendant guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act would be justified.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt, before a verdict finding the defendant guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act would be justified.

In charging generally on all the charges contained in the information herein and definitely on none.

In submitting the charge that defendant was guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II

of the National Prohibition Act, and the charges contained in the first and second counts of said Information to the jury, for the reason that as a result thereof, defendant was twice put in jeopardy for the same offense.

In failing to instruct the jury:

That circumstantial evidence should be acted upon with caution. [35]

That before a conviction can properly be had on circumstantial evidence, all the essential facts must be consistent with the hypothesis of guilt as that is to be compared with all the facts proved.

That the facts must exclude every other theory but that of guilt and that the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself.

8. That the evidence is insufficient to justify a verdict of guilty on the charge that defendant maintained a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act for this:

That there is nothing in the evidence showing or tending to show to whom the liquor said to have been found in the premises described in the Information herein, belonged.

That there is nothing in the evidence tending to show that the liquor mentioned in said count of said Information belonged to the defendant.

That there is nothing in the evidence tending to show how, when or by whom the liquor mentioned in said count of said information was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was ever the owner of, in possession [36] of, or in control of said liquor, or that he had any knowledge concerning its existence, or the place where it was kept.

That there is nothing in the evidence tending to show that if the liquor mentioned in said count of said information belonged to the defendant, he was not legally permitted to possess the same.

That unless it be conceded that the testimony given on the part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found, is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing in the evidence tending to show that said liquor was not kept in defendant's private dwelling for the personal consumption of the defendant and his family

residing in such dwelling and to his *bona fide* guests when entertained by him therein.

That if it be conceded that the testimony given on the part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing in the evidence tending to show that the defendant had any knowledge of, title to, or control over such liquor.

That there is nothing in the evidence tending to show that the liquor mentioned in the fifth count of said information and stated to have been intended for use in violation of Title II of the National Prohibition Act was kept in the premises mentioned in said information for sale, barter, or any other commercial purpose.

That there is nothing in the evidence tending to show that any intoxicating liquor had ever been sold, bartered or used for any commercial purpose in or on the premises described in the information herein or by the defendant at any time or place.

9. That the evidence is insufficient to justify [37] a verdict of guilty on the charge that defendant maintained a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act for this:

That by their verdict of not guilty on the first and second counts contained in the information

herein, the jury found that no liquor had been manufactured at or within the premises mentioned and described in the fifth count of said information.

That there is nothing in the evidence tending to show that any intoxicating liquor was ever manufactured at or within the premises mentioned and described in said count of said information.

That there is nothing in the evidence tending to show to whom any property contained in the premises mentioned in said count of said information which could have been used for manufacturing intoxicating liquor in violation of Title II of the National Prohibition Act belonged.

That there is nothing in the evidence tending to show that any property of any kind stated to have been used in said premises for the purpose of manufacturing intoxicating liquor in violation of Title II of the National Prohibition Act belonged to the defendant.

That there is nothing in the evidence tending to show how, when or by whom any property stated to have been found in the premises described in said count of said information which could have been used for the manufacture of intoxicating liquor in violation of Title II of the National Prohibition Act was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was the owner of, in possession of, or in control of any property stated to have been found in the prem-

ises described in said count of said information, which could [38] have been used for manufacturing intoxicating liquor in violation of Title II of the National Prohibition Act, or that he had any knowledge concerning its existence or the place where it was kept or the purpose for which it could be used.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for keeping liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be so occupied or used, such evidence is insufficient to justify the conviction of the defendant on the charge of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act, as charged in the fifth count of the information herein.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for keeping liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be so occupied or used, such proof would not justify the infliction of any penalty upon or punishment of the defendant other than that the room, house or building so occupied or used should be subject to a lien for and might be sold to pay all fines and costs assessed against the person guilty of maintaining a common nuisance in said room, house or building for such violation, and that any

such lien might be enforced by any court having jurisdiction as provided in the concluding sentence of Section 21 of the National Prohibition Act.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for the manufacture of liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be occupied or used, such evidence is insufficient to [39] justify the conviction of the defendant on the charge of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act, as charged in the fifth count of the information herein.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for the manufacture of liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be so occupied or used, such proof would not justify the infliction of any penalty upon or punishment of the defendant other than that the room, house or building so occupied or used should be subject to a lien for and might be sold to pay all fines and costs assessed against the person guilty of maintaining a common nuisance in said room, house or building for such violation, and that any such lien might be enforced by any court having jurisdiction as provided in the con-

cluding sentence of Section 21 of the National Prohibition Act.

10. That it appears from the uncontradicted testimony of the Government's witnesses, Van Orden and Fairchild, that the affidavit made by them and presented to the court by the United States Attorney, at the time he requested leave to file the information in the above-entitled court and cause, which affidavit is the sole basis on which the discretion of the court to grant the request of the United States Attorney for leave to file said information is based, was false and not according to the facts in many material respects, as a result of which:

The United States Attorney was mislead;

The Court was asked to and did exercise its discretion in authorizing the the filing of said information upon an entirely erroneous conception of the facts; and

The defendant was required to plead to and stand trial on an [40] information improperly filed and without proper basis in law.

And upon the true facts appearing, the Court should have annulled its order granting leave to file the information on file in the above-entitled court and cause and dismissed the action.

11. That the statements contained in said affidavit and not shown by the testimony of the Government's witnesses, Van Orden and Fairchild, to have been false, were not sufficient to justify the United States Attorney in requesting leave to file said information or to authorize the Court in the

exercise of its discretion, to have granted such request, as a result of which:

The United States Attorney was mislead;

The Court was asked to and did exercise its discretion in authorizing the filing of said information upon an entirely erroneous conception of the facts; and

The defendant was required to plead to and stand trial on an information improperly filed and without proper basis in law.

Each of these motions is based and will be presented on the records, files and minute entries in the above-entitled court and cause, the minutes of the court therein, and a bill of exceptions to be hereafter prepared, served, settled and filed.

WHEELER & BALDWIN,
Attorneys for Defendant.

Service of the above and foregoing motion for new trial acknowledged and copy thereof received at Butte, Montana, May 17, 1923.

JOHN L. SLATTERY,
United States Attorney for the District of Montana.

Filed May 17, 1923. C. R. Garlow, Clerk. [41]

And thereafter on May 21, 1923, a minute entry on the calling of the motion for a new trial was made herein, which minute entry is of record as follows, to wit:

In the District Court of the United States in and for the District of Montana.

No. 921.

UNITED STATES

vs.

ANTHONY CARNEY.

Motion for New Trial.

This cause came on regularly for hearing this day upon defendant's motion for a new trial, J. H. Baldwin, Esq., appearing for the defendant, and the District Attorney being present and appearing for the United States. Thereupon, the Court stated that it did not care to hear oral arguments, whereupon defendant filed a written brief and the matter was submitted to the Court and taken under advisement.

Entered in open court May 21, 1923.

C. R. GARLOW,
Clerk.

And thereafter on May 22, 1923, an order was entered herein denying the motion for a new trial, which motion is of record as follows, to wit: [42]

In the District Court of the United States in and for the District of Montana.

No. 921.

UNITED STATES

vs.

ANTHONY CARNEY.

Order Denying Motion for New Trial.

Herein, Court ordered that the defendant's motion for new trial, heretofore submitted, be and is denied, whereupon James H. Baldwin, Esq., attorney for defendant, then and there excepted to the ruling of the Court, and asked that defendant be granted a stay of ten days for bill of exceptions. Thereupon Court ordered that said defendant be granted a temporary stay of committment until Monday, May 28th, 1923, for the purpose of suing out a writ of error herein and furnishing bond in the sum of $1000.00 conditioned as usual.

Entered in open court May 22, 1923.

C. R. GARLOW,
Clerk.

And thereafter on May 28, 1923, petition for writ of error was served and filed herein, which petition for writ of error is of record as follows, to wit: [43]

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Petition for Writ of Error.

Comes now the defendant, Anthony Carney, and petitions this Court for a Writ of Error herein and says:

That on May 16, 1923, in the above-entitled matter, the above-entitled Court rendered a judgment and pronounced sentence herein against the defendant, by which the defendant was sentenced to be confined and imprisoned in the County Jail at Butte, Montana, for the term of seven months and to pay a fine of Two Hundred Fifty Dollars ($250.00) and costs taxed at Thirty-nine and 70/100 Dollars ($39.70), and to be confined in said county jail until said fine is paid, or he was otherwise discharged according to law, for three alleged offenses stated to have been committed on or about the 18th day of April, 1922, by the defendant herein, at and within certain premises situated at 205 West Quartz Street, in the city of Butte, in the county of Silver Bow, in the State and District of Montana, as follows:

1. Wrongfully and unlawfully having and possessing intoxicating liquor intended for use in violation of Title II of the National Prohibition Act;

2. Wrongfully and unlawfully having and possessing property designed for the manufacture of intoxicating liquor intended for use in violation of Title II of the National Prohibition [44] Act, and

3. Wrongfully and unlawfully maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept and manufactured, in violation of Title II of the National Prohibition Act;

That in said judgment and the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of this defendant, all of which will more fully appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error from the judgment of the above-entitled Court rendered and pronounced as aforesaid, may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of;

That such writ shall operate as a stay of proceedings under the sentence pronounced as aforesaid upon bail being given according to law and that a transcript of the records, proceedings and papers in this case duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California;

That said judgment and sentence be reversed, set aside and ordered held for naught, and

Such other orders as are fit and proper be made in the premises.

WHEELER & BALDWIN,
Attorneys for Anthony Carney, defendant.

Service of the above and foregoing petition acknowledged and copy thereof received at Butte, Montana, May 28, 1923.

JOHN L. SLATTERY,
United States District Attorney for the District of Montana.

Filed May 28, 1923. C. R. Garlow, Clerk. [45]

And thereafter on May 28, 1923, assignment of errors was served and filed herein, which assignment of errors is of record as follows, to wit:

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Assignment of Errors.

Comes now Anthony Carney, the defendant in the above-entitled action and hereby makes his assignment of errors upon which he will rely, as follows to wit:

1. The third charge contained in the information on file herein is insufficient in law for this:

That the charge contained in said count does not state facts sufficient to constitute a public offense.

That the facts stated in said count are not sufficient to show a violation of any criminal law of the United States of America.

That said count does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act.

2. The Court erred in overruling defendant's objection to the testimony given by the witness Fred Bolton concerning statements made by defendant's wife and transactions had in the absence of the defendant, as follows:

Q. Did your duties on that day or on or about the 18th of April last year take you to a residence at 205 West Quartz Street, in the city of Butte? [46]

A. Yes, sir.

Q. Had you ever been in that house before?

A. Never, no sir.

Q. Did you try to gain entrance that day?

A. Yes, sir.

Q. In what manner?

A. I went up to the front door and knocked on the door and a lady came to the door and I said, "I would like to inspect your gas meter—"

Mr. BALDWIN.—Objected to as hearsay.

The COURT.—Overruled.

By Mr. BALDWIN.—We will ask a general objection and exception.

The COURT.—It will be noted.

A. The lady said, "You can't get in now, wait a minute"; so I waited for about twenty minutes I guess and nobody came back so I goes back down to the office to report it to the foreman down there and I happened to run into Mr. Rodda at the police station.

3. The Court erred in overruling defendant's objection to the testimony given by the witness Rodda, relating to conversations had by him with the defendant's wife in the absence of the defendant, as follows:

Q. Do you know who was living in that house that time? A. Mrs. Carney said she owned—

Mr. BALDWIN.—Objected to as hearsay.

The COURT.—Overruled.

Mr. BALDWIN.—Exception.

A. Mrs. Carney said she owns the property, her and her husband.

Q. I will ask you to look at the defendant and state whether or not he is the husband of Mrs. Carney who made that statement to you?

A. He looks like the man, yes, sir.

Q. Mr. Rodda when you went up to the doorway or door in this house on the occasion you testified to was the door open or closed? [47]

A. The door was closed.

Q. What did you do?

A. Knocked on the door.

Q. Who came to the door? A. Mrs. Carney.

Q. Is that the first place in or about that house you saw her? A. Yes, sir.

Mr. BALDWIN.—Objected as unnecessary repetition and not proper rebuttal.

Q. Let me ask you what if anything did she say to you about a search-warrant?

A. She didn't say anything about the search-warrant until after we got the still and mash.

Q. What did she say then?

A. She said, "Have you got a search-warrant, and I said, "No, lady, we got a still."

4. The Court erred in proceeding with the trial after it appeared from the testimony of the witnesses Rodda and Fairchild, on whose affidavit leave to grant the information filed herein, was granted, while testifying as witnesses for the Government, that the affidavit made by them and on which the order granting leave to file the information was based, was false.

5. The Court erred in not withdrawing its leave to file the information filed herein and dismissing the action, when it appeared from the uncontradicted evidence of the witnesses Rodda and Fairchild, while testifying on behalf of the Government, that the statements contained in their affidavit and on which the Court acted in granting leave to file the information herein, were false.

6. That the statements contained in said affidavit and not shown by the testimony of the Government's witnesses, Rodda and Fairchild, to have been false, were not sufficient to justify the United States Attorney in requesting leave to file the information [48] herein or to authorize the Court in the exercise of judicial discretion, to have granted such request, as a result of which, it appears on the face

of the record, that the defendant was improperly arrested and called for trial in violation of the provisions of the Fourth Amendment to the Constitution of the United States of America.

7. The Court erred in denying defendant's motion for a directed verdict made at the conclusion of the Government's case in chief.

8. The court erred in stating in the presence of the jury, at the time defendant's motion for a directed verdict was overruled, that "the evidence is enough to hang a man if he was on trial for murder," the proceedings at that time being as follows:

Mr. SLATTERY.—The Government rests.

Mr. BALDWIN.—We ask at this time if your Honor please for a directed verdict on the grounds there is not sufficient evidence showing the defendant had any personal knowledge of this transaction or was personally present or had control of the particular portion of the premises in which the evidence is said to have been found, the testimony on that point being that the defendant was not present and was arrested at a following date and he said that someone else rented the premises and he had no control over it.

The COURT.—The evidence is enough to hang a man if he was on trial for murder. The motion is denied.

Mr. BALDWIN.—As an exception.

The COURT.—It will be noted.

While charging the jury the Court erred as follows:

9. In its definition of a reasonable doubt.

10. In its statement of the law relating to the presumption of innocence.

11. In failing to tell the jury that the presumption of innocence is an instrument of proof created by law in favor of one [49] accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created.

12. That this presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

13. That this legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party charged with crime is entitled.

14. That the presumption of innocence is evidence in favor of the accused which must be borne in mind by the jury and considered by them with all of the other evidence in the case in arriving at their verdict.

15. That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

16. In charging that the presumption of innocence is merely a status created by law at the commencement of the trial.

17. In failing to charge the jury that to overturn the presumption of innocence, there must be

evidence of guilt carrying home a degree of conviction short only of absolute certainty.

18. In stating that a statement said to have been made by the defendant's wife in his absence, concerning the necessity of a search-warrant authorizing the searching of the premises described in the Information herein, was an admission of guilty knowledge, from which the jury might infer that the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

19. In stating that the evidence was such as to require the inference that the defendant was a partner with Joe O'Donnell in [50] connection with the matters charged in the Information herein.

20. In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said Information.

21. In stating that the jury had a perfect right to infer from the evidence that the defendant and Joe O'Donnell were partners in connection with the matters charged in said count of said Information.

22. In stating that the defendant testified that he did not know anything about the search of the premises described in the Information until he was told about it by the officers at the time they arrested him.

23. In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

24. In using the word "bamboozled" in connection with its comment concerning the testimony.

25. In using the word "hoodwinked" in connection with its comment concerning the testimony.

26. In using the word "gulled" in connection with its comment concerning the testimony.

27. In failing to state definitely the elements essential to the commission of the crime charged to have been committed in the third count of the information.

28. In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the third count of the information.

29. In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the third count of the information would be justified.

30. In failing to state definitely the elements essential [51] to the commission of the crime charged to have been committed in the fourth count of the information.

31. In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the fourth count of the information.

32. In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the fourth count of the information would be justified.

33. In failing to state definitely the elements essential to the commission of the crime charged to have been committed in the fifth count of the information.

34. In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the fifth count of the information.

35. In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the fifth count of the information would be justified.

36. In charging generally on all of the counts contained in the information herein and definitely on none.

While charging the jury the Court erred in failing to instruct:

37. That circumstantial evidence should be acted upon with caution.

38. That before a conviction can properly be had on circumstantial evidence, all the essential facts proved must be consistent with the hypothesis of guilt as that is to be compared with all the facts proved.

39. That the facts must exclude every other theory but that [52] of guilt and that the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

40. In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

41. In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself.

42. That there is no substantial evidence in this case sustaining the charge contained in the third count of the information on file herein.

43. That there is no substantial evidence in this case sustaining the charge contained in the fourth count of the information on file herein.

44. That there is no substantial evidence in this case sustaining the charge contained in the fifth count of the information on file herein in so far as the charge that the defendant maintained a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act, is concerned.

45. That there is no substantial evidence in this case sustaining the charge contained in the fifth count of the information on file herein in so far as the charge that the defendant maintained a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act, is concerned.

46. The Court erred in submitting to the jury for their consideration the charge contained in the third count of the information herein with the

charge contained in the fifth count of said information, in so far as the same relates to maintaining [53] a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act, the effect of such submission being for the same offense to twice put the defendant in jeopardy.

47. The Court erred in rendering judgment and pronouncing sentence against the defendant on the charge contained in the fifth count of the information herein, in so far, as it relates to maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act, after the jury had found the defendant not guilty on the charges contained in the first and second counts of said information.

48. The court erred in rendering judgment and pronouncing sentence against the defendant on the third count contained in the information herein and that portion of the fifth count of said information relating to maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

49. The Court erred in rendering judgment and pronouncing sentence on the fourth count of the information contained herein and on that portion of the fifth count of said information relating to maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act.

50. The court erred in failing to render judgment and pronounce sentence separately on each of the counts contained in the information on which judgment was rendered and sentence pronounced against the defendant.

WHEELER & BALDWIN,
Attorneys for Defendant. [54]

Service of the above and foregoing assignment of errors acknowledged and copy thereof received at Butte, Montana, May 28, 1923.

JOHN L. SLATTERY,
United States District Attorney for the District of Montana.

Filed May 28, 1923. C. R. Garlow, Clerk.

And thereafter on May 28, 1923, the prayer for reversal was served and filed herein, which prayer of reversal is of record as follows, to wit: [55]

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Prayer for Reversal.

Comes now the defendant in the above-entitled action and prays that the judgment rendered and

sentence pronounced therein in the District Court of the United States, in and for the District of Montana, on May 16, 1923, shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and

That such other and further orders as may be fit and proper in the premises may be made in the above-entitled cause by said Circuit Court of Appeals.

WHEELER & BALDWIN,
Attorneys for Defendant.

Service of the above and foregoing prayer acknowledged and copy thereof received at Butte, Montana, May 28, 1923.

JOHN L. SLATTERY,
United States District Attorney for the District of Montana.

Filed May 28, 1923. C. R. Garlow, Clerk.

And thereafter on May 28, 1923, an order allowing the writ of error was signed and filed herein, which order is of record as follows, to wit: [56]

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Order Allowing Writ of Error.

On this 28 day of May, 1923, the defendant, Anthony Carney, by his attorneys, having filed herein and presented to the Court his petition praying that a writ of error from the judgment of the above-entitled court rendered and sentence pronounced in the above-entitled matter on May 16, 1923, may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors complained of in his said petition and specifications of errors filed therewith, and an assignment of errors intended to be urged by him, and praying also that a transcript of the records, proceedings and papers upon which the judgment herein was rendered and sentence pronounced, duly authenticated, may be presented to the United States Circuit Court of Appeals of the Ninth Circuit and that such other and further proceedings may be had as are meet and proper in the premises.

IN CONSIDERATION WHEREOF, the Court hereby allows a writ of error from the judgment of the District Court in the above-entitled matter, and orders that such writ shall operate as a stay of proceedings under the sentence pronounced as aforesaid, upon the defendant giving bond according to law in the sum of One Thousand Dollars ($1,000.00) and that upon the due [57] execution

and approval of said bond, the same shall act as a supersedeas herein.

BOURQUIN,

Judge of the United States District Court in and for the District of Montana.

Filed May 28, 1923. C. R. Garlow, Clerk.

Service of the above and foregoing order allowing writ of error acknowledged and copy thereof received at Butte, Montana, May 28, 1923.

JOHN L. SLATTERY,

United States District Attorney for the District of Montana.

And thereafter, to wit, on the 28th day of May, 1923, a writ of error was duly issued herein and thereafter on the 28th day of May, 1923, filed herein, being as follows, to wit: [58]

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY CARNEY,

Defendant.

Writ of Error.

The President of the United States of America to the Judge of the District Court of the United States for the District of Montana, GREETING:

Because in the record and proceedings and also in

the rendition of a plea which is in the District Court of the United States for the District of Montana, before you, between the United States of America and Anthony Carney, manifest errors have happened to the great damage of Anthony Carney, as by the record herein appears, and it being fit that the errors, if any there have been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf:

YOU ARE HEREBY COMMANDED, if judgment be therein given, that under your seal distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of California, together with this writ so that you may have the same at the city of San Francisco within thirty days from the date of this writ, in the said United States Circuit Court of Appeals, to be there and then held that the records and proceedings [59] aforesaid may be inspected and the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct said errors, if any, and do what is right and according to the laws and customs of the United States of America should be done.

Witness the Honorable WILLIAM H. TAFT, Chief Justice of the United States of America this 28th day of May, 1923, and of the Independence of

the United States of America the one hundred forty-sixth year.

[Seal] C. R. GARLOW,
Clerk of the District Court of the United States for the District of Montana.

By L. R. Polglase,
Deputy Clerk.

Service of the above and foregoing writ of error acknowledged and copy thereof received at Butte, Montana, May 28th, 1923.

JOHN L. SLATTERY,
United States District Attorney for the District of Montana.

Answer of the Court to Writ of Error.

The answer of the Honorable, the District Judge of the United States, District of Montana, to the foregoing writ.

The record and proceedings whereof mention is made, with all things touching the same, I certify, under the seal of said District Court, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] C. R. GARLOW,
Clerk.

By L. R. Polglase,
Deputy Clerk. [60]

[Endorsed]: #921. In the District Court of the United States for the District of Montana.

The United States of America, Plaintiff, vs. Anthony Carney, Defendant. Writ of Error. Filed May 28th, 1923. C. R. Garlow, Clerk. By L. R. Polglase, Deputy Clerk.

And thereafter, to wit, on the 28th day of May, 1923, a citation was duly issued herein, and thereafter on May 28, 1923, filed herein, being as follows, to wit:

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Citation.

United States of America,—ss.
The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the office of the clerk of the District Court of the United States for the District of Montana, wherein Anthony Carney is plaintiff

in error and the United States of America is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected or reversed or a new trial granted and speedy justice should not be done to the parties in that behalf.

Dated at Butte, Montana, May 28, 1923.

BOURQUIN,
United States District Judge for the District of Montana.

Service of the above and foregoing citation acknowledged and copy thereof received at Butte, Montana, May 28th, 1923.

JOHN L. SLATTERY,
United States District Attorney for the District of Montana. [61]

[Endorsed]: #921. In the District Court of the United States for the District of Montana. The United States of America, Plaintiff, vs. Anthony Carney, Defendant. Citation. Filed May 28, 1923. C. R. Garlow, Clerk. By L. R. Polglase, Deputy Clerk.

And thereafter on May 28, 1923, an order allowing the writ of error was entered herein, which order is of record as follows, to wit:

In the District Court of the United States in and for the District of Montana.

No. 921.

UNITED STATES

vs.

ANTHONY CARNEY.

Order Allowing Writ of Error.

On this 28th day of May, 1923, the defendant, Anthony Carney, by his attorneys, having filed herein and presented to the court his petition praying that a writ of error from the judgment of the above-entitled court rendered and sentence pronounced in the above-entitled matter on May 16, 1923, may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors complained of in his said petition and specifications of errors filed therewith, and an assignment of errors intended to be urged by him, and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered and sentence pronounced, duly authenticated, may be presented to the United States Circuit Court of Appeals of the Ninth Circuit and that such other and further proceedings may be had as are meet and proper in the premises.

In consideration whereof the Court hereby allows a writ of error from the judgment of the District Court in the above-entitled matter and orders that

such writ shall operate as a stay of proceedings under the sentence pronounced as aforesaid, upon the defendant giving bond according to law in the sum of ($1,000.00) One Thousand Dollars, and that upon the due execution and approval of said bond, the same shall act as a supersedeas herein.

Entered in open court May 28, 1923.

C. R. GARLOW,
Clerk.

Thereafter on July 6th, 1923, a bill of exceptions was signed, settled and allowed and ordered filed, which bill of exceptions is of record as follows, to wit: [62]

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on May 26, 1922, in open court, John L. Slattery, then and there the duly appointed, qualified and acting United States Attorney for the District of Montana, requested leave to file an information in the above-entitled court charging the defendant with violations of the

National Prohibition Act, and in support of such request presented to the court and filed in the above-entitled court and cause affidavits in words and figures as follows: [63]

Butte, Montana, April 29, 1922.

UNITED STATES

vs.

ANTHONY CARNEY.

Chas. Rodda and Sam Fairchild, being first duly sworn according to law depose and say:

That they are the duly appointed, qualified and acting police officers of the city of Butte, Montana, and were such on the 18th day of April, 1922.

That during the day of April 18, 1922, man known to them as Fred Bolton and employed by the Montana Gas Company, came to them and complained that at certain premises, 205 West Quartz Street, Butte, Montana, he was refused admission to premises for the purpose of reading gas meter.

That they went with man to premises 205 West Quartz Street, and upon entering noticed a very strong odor of mash, that upon investigation they discovered 75 gallon mash, in a state of fermentation, a quantity of white moonshine whiskey, one 12 gallon still and connections.

That they then arrested Anthony Carney and brought him to police station. Anthony Carney being owner of premises occupying same and having full control of same.

Sample of mash and whiskey turned over to the Federal Prohibition Department at Butte, Montana, together with still and connections.

CHARLES RODDA.
SAM FAIRCHILD.

Subscribed and sworn to before me this 9th day of May, 1922.

F. J. DALLMAN,
Deputy Collector of Internal Revenue. [64]

United States of America,
District of Montana,—ss.

Charles Rodda and Sam Fairchild after each being first duly sworn upon his oath according to law deposes and says as follows to wit:

That they are duly appointed, qualified and acting police officers of the city of Butte, Montana, and were such on the 18th day of April, 1922;

That while engaged in the dispatch of their official duties, they were at those premises situated at 205 West Quartz Street, in the city of Butte, and found therein a twelve gallon still together with the equipment used in connection with the operation of the same, set up and in operation and also found Anthony Carney in charge of the said premises engaged in the operation of the said still and in the manufacture of intoxicating liquors.

CHARLES RODDA.
SAM FAIRCHILD.

Subscribed and sworn to before me this 24th day of May, 1922, Butte, Montana.

J. F. DALLMAN,
Deputy Collector U. S. I. R. S. [65]

That thereupon the Court granted leave to file said information.

That at the time said request was made and said leave granted, nothing tending to show probable cause or to believe that a violation of the National Prohibition Act as charged in said information had been committed by anyone or that any violation of the National Prohibition Act had been committed by the defendant other than the statements contained in said affidavits, was offered or introduced and no evidence of any kind tending to show probable cause to believe that a violation of the National Prohibition Act as charged in said information had been committed by anyone or that any violation of the National Prohibition Act had been committed by the defendant, Anthony Carney, other than the statements contained in said affidavits, was offered or introduced and in granting leave to file said information, the Court acted solely on proof contained in said affidavits.

That thereafter and on May 29, 1922, at Butte, Montana, the defendant, Anthony Carney, appeared in the above-entitled court and cause for arraignment and then and there answered that his true name was as charged in said information, waived reading of the information and entered a plea of not guilty to each and all of the charges contained therein.

That on May 15, 1923, the above-entitled cause came duly and regularly on for trial before the above-entitled Court, the Honorable George M. Bourquin, Judge presiding, on the issues joined by

defendant's said plea of not guilty to the charges contained in said information, John L. Slattery, the United States District Attorney for the District of Montana, being present on the part of the United States and the defendant being present in court in person and represented by James H. Baldwin, one of his attorneys; a jury of twelve men was duly and regularly impaneled to try said issues and thereafter and on that day, the following proceedings were had: [66]

Testimony of Fred Bolton, for the Government.

FRED BOLTON, called as a witness on behalf of the United States, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. SLATTERY.)

Q. You may state your name? A. Fred Bolton.

Q. Where do you reside?

A. 630 South Jackson Street.

Q. City of Butte, Montana? A. Yes, sir.

Q. Butte is in the state and district of Montana?

A. Yes, sir.

Q. What were your duties about the 18th of April last year? A. Inspecting gas meters.

Q. For whom? A. The Montana Power.

Q. Did your duties on that day or on or about the 18th of April last year take you to a residence at 205 West Quartz Street in the City of City of Butte? A. Yes, sir.

Q. Had you ever been in that house before?

A. Never, no, sir.

(Testimony of Fred Bolton.)

Q. Did you try to gain entrance that day?

A. Yes, sir.

Q. In what manner?

A. I went up to the front door and knocked on the door and a lady came to the door and I said I would like to inspect your gas meter—

Mr. BALDWIN.—Objected to as incompetent, irrelevant, immaterial and hearsay.

The COURT.—Overruled. [67]

By Mr. BALDWIN.—We will ask a general objection and exception on the same grounds of all testimony to be given concerning statements made and transactions had in the absence of the defendant.

The COURT.—It will be noted.

A. The lady said, "You can't get in now, wait a minute"; so I waited about twenty minutes I guess and nobody came back so I goes back down to the office to report it to the foreman down there and I happened to run into Mr. Rodda at the police station.

Q. Is he one of the police officers of the city of Butte?

A. Yes, sir; and I told him I thought—

Q. You don't need to tell what you told him. Now you say you waited for about twenty minutes after the lady told you to wait? A. Yes, sir.

Q. Did you then leave the house? A. Yes, sir.

Q. Did you subsequently return there the same day? A. Yes, sir.

Q. About how long after that?

A. About half an hour.

(Testimony of Fred Bolton.)

Q. Who if anyone accompanied you to this home?

A. Mr. Rodda and Mr. Fairchild of the police station.

Q. Were they both with—were they both that time officers of the city of Butte? A. Yes, sir.

Q. After you got back to the house with these two men what happened?

A. I think Mr. Rodda went up to the front door and Mr. Fairchild and I went back to the back door; I don't know what took place at the front door.

Q. What happened at the back door?

A. Mr. Rodda left us in and I told him I wanted to inspect the gas meter and I goes down the cellar and finds the meter all right and I [68] believe Mr. Rodda found the still—

Mr. BALDWIN.—We ask that the answer I believe be stricken.

Mr. SLATTERY.—No objection.

The COURT.—Very well.

Q. Did you see in that house a still?

A. Yes, sir.

Q. Calling your attention to this still here, come and examine this? A. Yes, sir.

Q. Do you identify that as the still found in that house that day? A. Yes, sir.

Q. Whereabouts in the house was it?

A. Well, it's a double house; it's in the kitchen.

Q. In the kitchen.

A. Yes, sir, I believe two kitchens to the house and in the kitchen on the east side of the house.

(Testimony of Fred Bolton.)

Q. Did you find out while in the house who the lady was in there? A. No, I didn't.

Q. Was the lady in the house in the same room where the still was?

A. No, sir, she was in the other side of the house.

Q. You say that's the still you saw?

A. Yes, sir.

I offer it in evidence.

Mr. BALDWIN.—Objected to as incompetent, irrelevant and immaterial for the reason there is no connection shown between the defendant and the still.

The COURT.—If there is none shown it will be harmless. Overruled.

Mr. BALDWIN.—Exception.

The COURT.—Noted.

Q. Do you know who was living in that house that time?

Mr. BALDWIN.—Objected unless they confine it to that portion of the house in which the still was found.

The COURT.—Overruled. [69]

Mr. BALDWIN.—Exception.

The COURT.—Noted.

A. No, sir.

Q. What else did you see in there besides the still?

A. Well, I seen about—well about a fifty-gallon barrel of mash and a beer keg about half full.

Q. Notice what kind of mash it was?

A. Yes, it was corn.

(Testimony of Fred Bolton.)

Q. Did you—or did it have an odor?

A. Yes, sir.

Q. Do you know what fermentation is?

A. Yes, sir.

Q. Was that in the state of fermentation or not?

A. Yes, sir.

Q. It was? A. Yes, sir.

Q. Did you find any whiskey there or see any whiskey found? A. Yes sir, a small bottle.

Q. Would you be able to identify the bottle?

A. No, sir; I wouldn't.

Q. How long did you remain in there with the officers?

A. Well, I should judge about half an hour.

Cross-examination.

(By Mr. BALDWIN.)

Q. What day was this?

A. I don't know what day it was; it was around April, about the middle of April, 1922.

Q. You made no notes on what you saw or the date or anything concerning this matter?

A. No, sir.

Q. You didn't see Carney there that day, the defendant here? A. No, sir. [70]

Q. You were all through the house with the officers? A. Yes, sir.

Q. Mr. Carney was not present at that time or place? A. No, sir.

Witness excused. [71]

Testimony of Charles Rodda, for the Government.

CHARLES RODDA, called as a witness, and after being duly sworn and examined, testified as follows:

Direct Examination.

(By Mr. SLATTERY.)

Q. You may state your name?

A. Charles Rodda.

Q. What is your business?

A. Police officer of the city of Butte.

Q. How long have you been such?

A. Between ten and twelve years.

Q. As such officer did you on or about the middle or the 18th of April last year go to a house at 205 West Quartz Street in the city of Butte?

A. Yes, sir.

Q. Who accompanied you?

A. Officer Fairchild and Mr. Bolton.

Q. The gentleman who just testified?

A. Yes, sir.

Q. Was it by virtue of a certain report which he made to you or Mr. Fairchild you went to this house? A. Yes, sir.

Q. Do you know who was living in that house that time? A. Mrs. Carney said she owned—

Mr. BALDWIN.—Objected to as hearsay.

The COURT.—Overruled.

Mr. BALDWIN.—Exception.

A. Mrs. Carney said she owns the property, her and her husband.

(Testimony of Charles Rodda.)

Q. I will ask you to look at the defendant and state whether or not he is the husband of Mrs. Carney who made that statement to you?

A. He looks like the man, yes, sir.

Q. When you got to the house on that occasion what occurred?

A. I told Mrs. Carney I was a police officer from the city—

Mr. BALDWIN.—This all goes in under the general objection as [72] hearsay in the absence of the defendant.

The COURT.—I think we will pass over that for the present at least. Sustained.

Q. Did you finally secure entrance to the house?

A. Yes, sir.

Q. How long did it take you to get in after the first knock? A. Not over a minute probably.

Q. What kind of a house was it, is it?

A. It is a large building with a hallway going between the center of the rooms at the right also on the left.

Q. Looking at the still which has been introduced in evidence here, state to the jury whether or not you observed that in the house.

A. It looks like the one.

Q. What room of the house did you find it in?

A. In the kitchen on the stove on the east side of the building.

Q. And do you know what room or rooms were occupied by the Carneys?

(Testimony of Charles Rodda.)

A. Mrs. Carney was in the west side of the building in the kitchen.

Q. She was in the west side? A. Yes, sir.

Q. Was the defendant Carney himself around there? A. No, sir; not at that time.

Q. How did you happen to find the still?

A. The door was open and I took a glance in the room and there I seen the still.

Q. Was there any odor attracted your attention?

A. Yes, sir; when Mrs. Carney opened the front door.

Q. Was there anybody in the kitchen where the still was? A. No, sir.

Q. Did Mrs. Carney accompany you there?

A. Yes, sir.

Q. And did she enter the kitchen where the still was?

A. She entererd after I opened the door; the door was partially [73] opened.

Q. What did she say if anything?

Mr. BALDWIN.—Objected to as hearsay in the absence of the defendant.

The COURT.—For the present sustained.

Q. Did she make some statement; just say yes or no? A. She made a statement—

Q. Just a moment, just what, yes or no. Did she say anything? A. No, sir.

Q. When you went in the room? A. No, sir.

Q. Did you find anything else in there beside the still?

(Testimony of Charles Rodda.)

A. A fifty gallon barrel of mash and about ten gallons of another barrel, a beer keg.

Q. What kind of mash was it? A. Corn.

Q. In a state of fermentation or not?

A. Yes, sir.

Q. Did you find any moonshine whiskey there?

A. About pretty near a half a gallon.

Q. Looking at this bottle here, state whether or not in your opinion that is the bottle was found there? A. Yes, sir; I think it is.

Q. Did you smell of the contents?

A. Yes, sir, I smelled it before; yes, sir.

Q. What have you to say whether or not the contents appear to be the same as when you found the bottle and contents in that house?

A. About the same I should say.

We offer this in evidence.

The COURT.—Admitted.

Mr. SLATTERY.—I ask that it be called Exhibit "B."

Q. Did you remove the still, mash and whiskey from the house? [74] A. Yes, sir.

Q. How soon after did you see the defendant Carney? A. The next day.

Q. Where? A. At his residence.

Q. The same place? A. Yes, sir.

Q. What room did you find him in?

A. He was coming in from work.

Q. Where were you?

A. We just got at the back door as he came.

Q. Did you enter the house on that occasion?

(Testimony of Charles Rodda.)

A. Yes, sir.

Q. What room did the defendant go in?

A. In the hallway on the west side.

Q. Was he in the room where you found the still and mash? A. Just in between.

Q. What is the distance between the two rooms?

A. About four feet.

Q. Was there evidence of anybody else occupying that side of the premises?

Mr. BALDWIN.—Objected to as calling for a conclusion.

The COURT.—Overruled.

A. That I couldn't say.

Q. What was there in this kitchen that you saw beside the still and mash and whiskey?

Mr. BALDWIN.—Objected to as too indefinite unless he fixes east or west.

Q. You found only one still there? A. Yes, sir.

Q. In the room where the still was what was there besides the still, mash and whiskey?

A. There was a stove. [75]

Q. Kitchen utensils?

A. Yes, sir, a chair or two.

Q. Did it appear to be a kitchen used by somebody for cooking?

A. It appears the premises was being used.

Q. Did you go into any other room on that side of the house? A. Yes, sir.

Q. Find anybody living there?

A. No person there when we went there.

(Testimony of Charles Rodda.)

Q. Did you find the rooms filled with furniture or fixtures?

A. Yes, sir, a bed in there.

Q. Make any inquiries of anybody whether somebody was living on that side of the house where you found the still?

Mr. BALDWIN.—Objected to as hearsay.

The COURT.—Sustained.

Q. What if anything did the defendant say the next day when you found him?

A. Mr. Carney?

Q. Yes?

A. He said another man had the renting of them rooms, rented them from him.

Q. He said another man had been renting the rooms? A. Yes, sir.

Q. Did he deny he was operating the still?

A. Yes, sir.

If the Court please, I find I am taken by surprise in this action by his testimony.

The COURT.—You may show if he made contradictory statements.

Q. You signed an affidavit did you not, Mr. Rodda, that while engaged in the duties of your—

Mr. BALDWIN.—We ask the affidavit be shown to him.

Q. You saw the affidavit?

A. There are lots of affidavits which we sign when we are in a hurry [76] and have to get out. This is not right, Mr. Carney wasn't there.

Q. You signed that affidavit? A. Yes, sir.

(Testimony of Charles Rodda.)

Q. In that affidavit you stated that while engaged in the discharge of your official duties you were at the premises situated at 205 West Quartz Street and found therein a twelve gallon still together with equipment used in connection of the same set up and in operation and also found Anthony Carney in said premises and manufacturing intoxicating liquor. That's what you said in the affidavit?

A. There is a mistake in it, whoever wrote it up; yes, sir.

Cross-examination.

(By Mr. BALDWIN.)

Q. Now, Mr. Rodda, in making this affidavit, as I understand it, you were mistaken if you said that you found Carney in charge of the premises engaged in the operation of the still and the manufacture of intoxicating liquor. He wasn't there?

A. That wasn't drawed up the way our report was turned in.

Q. A portion is written in handwriting after the conclusion of it?

The COURT.—Not all of it.

Q. And manufacture of intoxicating liquor was written in by hand or was it there when you signed it? A. I never seen it there.

Q. Anyway it isn't right? A. No, sir.

Redirect Examination.

(By Mr. SLATTERY.)

Q. Do you know whose writing that is?

A. I don't; no, sir.

(Testimony of Charles Rodda.)

The COURT.—Q. Where did you sign that affidavit?

A. It was brought to the police station.

Q. Before whom did you sign it?

A. Well, I couldn't say. [77]

Q. Didn't you read it before you signed it?

A. We had a hurry up call that day.

Q. I suppose you have hurry up calls every day?

A. Some days we do; not every day.

Witness excused. [78]

Testimony of Sam Fairchild, for the Government.

SAM FAIRCHILD, called as a witness, and after being first duly sworn and examined, testified as follows:

Direct Examination.

(By Mr. SLATTERY.)

Q. You may state your name?

A. Sam Fairchild.

Q. What is your business?

A. Police officer, city of Butte.

Q. How long have you been such?

A. Sixteen years.

Q. About the 18th of April last year did you accompany Mr. Rodda, who just testified, and Mr. Bolton to a building at 205 West Quartz Street in the city of Butte? A. Yes, sir.

Q. Did you gain entrance to the house?

A. Yes, sir.

Q. What did you find there in the nature of a still or any whiskey?

(Testimony of Sam Fairchild.)

A. We found a half a gallon I should judge, half a gallon of moonshine and sixty gallons of mash and a still.

Q. Does that still there look like it?

A. Yes, sir.

Q. Does this look like the moonshine whiskey found there? A. Yes, sir.

Q. Which side of the house?

A. On the east side.

Q. What kind of room? A. In the kitchen.

Q. Was—did you see any person in that room besides you two officers? A. No, sir.

Q. Did you see a woman there or a lady? [79]

A. I saw a lady but she was on the west side of the kitchen.

Q. Did the lady accompany you or anybody else into the room where this whiskey was found?

A. No, sir.

Q. Did you see any other person there at all beside this lady? A. No, sir.

Q. Didn't see the defendant there?

A. No, sir; we didn't.

Q. Do you know Carney the defendant?

A. No, sir, I have saw him; I saw him the next day.

Q. Well, Mr. Fairchild, you also made an affidavit did you not? A. Yes, sir.

Q. An affidavit with respect to this case?

A. Yes, sir. I should or will explain this matter to the Judge.

(Testimony of Sam Fairchild.)

Q. First let me ask you this. I will say this is the same affidavit I showed to Mr. Rodda?

A. Yes, sir, the same.

Q. In that affidavit you stated you found the defendant Anthony Carney in charge of the premises engaged in the operation of the still and in the manufacture of intoxicating liquors;—you say now that is a mistake?

A. I want to explain this to the Court. The day this affidavit was signed they hollered for me—I am driving the police car—and I signed that and I did not read it; didn't have a chance to. It was a mistake of mine which I should have done but I couldn't as I was called very quick and I couldn't recall the call I made; it was a quick call and I went up and signed the report and I got the call and someone called me to sign that and I did.

Mr. BALDWIN.—No cross-examination.

The COURT.—Q. What else was on the east side of the house besides what you found? [80]

A. We found the still and whiskey in the kitchen; in the next room to it we found a bed setting in that room and about sixty gallons of mash at the foot of the bed, a fifty gallon barrel and a ten gallon keg; that was all I saw there.

Q. Any clothing or anything?

A. No, sir; nothing more than bed clothing.

Q. Any tables, dishes, anything else?

A. No, sir.

Q. Were the doors locked on that east side?

A. No, sir; they were not.

(Testimony of Sam Fairchild.)

Q. Did you see anyone's shoes or hats or anything? A. No, sir, I don't think I did.

Q. How many rooms on that east side?

A. I think there are three rooms on that side; I don't know; I couldn't see.

Mr. SLATTERY.—Q. Was there any odor that was noticeable throughout the house? A. Yes, sir.

Q. What was the odor?

A. It was a mash smell; you could smell the mash. It was fermenting.

Mr. SLATTERY.—The Government rests.

Mr. BALDWIN.—We ask at this time if your Honor please for a directed verdict on the grounds there is not sufficient evidence showing the defendant had any personal knowledge of this transaction or was personally present or had control of the particular portion of the premises in which the evidence is said to have been found, the testimony on that point being that the defendant was not present and was arrested at the following date and he said that someone else rented the premises and he had no control over it.

The COURT.—The evidence is enough to hang a man if he was on trial for murder. The motion is denied.

Mr. BALDWIN.—Ask an exception. [81]

The COURT.—It will be noted.

Testimony of Mrs. Anthoney Carney, for Plaintiff.

MRS. ANTHONEY CARNEY, called as a witness, and after being first duly sworn and examined testified as follows:

Direct Examination.

(By Mr. BALDWIN.)

Q. You may state your name?

A. Mrs. Anthoney Carney.

Q. You are the wife of the defendant?

A. Yes, sir.

Q. And you lived with him at 205 West Quartz Street in Butte, last year and this year?

A. I have lived with him going on eight years at the same address.

Q. In that house you live in you live on the west side? A. Yes, sir.

Q. And your husband and you reside on the west side and what do you do with the east side of the building?

A. We have it rented continually; that is any time we could.

Q. And how is the building arranged Mrs. Carney; can you explain to the jury the construction of the building, that is, the method in which it is planned?

A. It is a five-room frame building, a hallway straight through from the front door with two rooms on the east side and three to the west and hot and cold water to supply the housekeeping rooms and I live on the west side of the house.

(Testimony of Mrs. Anthoney Carney.)

Q. You and your husband occupy three west rooms and have been renting the two east rooms?

A. Yes, sir.

Q. For what length of time has that been the custom?

A. Since we been there; the first year I had boarders and then I gave them up and since then rented them housekeeping rooms. [82]

Q. Were those rooms on the east side rented in the month of April, 1922? A. Yes, sir.

Q. Were they rented through that month?

A. Up until the time of the raid.

Q. Then—that's the time the men came in and got this still? A. Yes, sir.

Q. Now, Mrs. Carney, did you have any control of those rooms during that month up to that time the officers came there?

A. No, sir; I gave them over the key and had nothing to do with it.

Q. As I understand it there is a hallway running through the building? A. Yes, sir.

Q. A back entrance and front entrance to the building? A. Yes, sir.

Q. This entrance or entrances lead to the hall from the rear and front of the building?

A. Yes, sir.

Q. Now, when the officers came there where was your husband, Mr. Carney?

A. He was working at the Bell mine.

Q. How long had he been working there that time?

(Testimony of Mrs. Anthoney Carney.)

A. He is always working there; mostly all the time working. He was working there right along steady at the time.

Q. Working every day at the Bell mine at what capacity?

A. Well, he was a contract miner at the time.

Q. You mean a man working for the company on contract gets so much a foot for work done?

A. Yes, sir.

Q. He was employed each day that month was he? A. Yes, sir.

Q. Has he been employed continuously since?

A. He got a job as shift boss shortly after working for the same [83] company.

Q. Working at the same mine since then?

A. Yes, sir.

Q. And been made a shift boss? A. Yes, sir.

Mr. SLATTERY.—Objected to as leading and immaterial.

The COURT.—She has answered. Proceed.

Q. Mrs. Carney, was he home at the time the officers came there? A. No, sir.

Q. Did they arrest anyone when they came there that day? A. No, sir.

Q. Now, Mr. Bolton has testified that he talked to some woman who said she couldn't let him in at the moment but would let him in later?

A. Yes, sir.

Q. Tell the Court what that occurrence was?

A. I answered the door; I wasn't prepared, I had a sick baby, and I went back and he wanted

(Testimony of Mrs. Anthoney Carney.)

to see the meter and the time I got prepared he was at the foot of the steps and I said all right and when I looked out he went in a truck or a machine and went down the street and I shut the door and came back in.

Q. Did you know that time who he was?

A. He said he wanted to see the meter.

Q. The meter is situated in the cellar?

A. In the cellar of my kitchen; my meter for my gas stove is in my kitchen.

Q. That is on the west side of the house?

A. Yes, sir.

Q. Where is that meter situated?

A. In the cellar.

Q. You went back to arrange things and allow him to go through the house and when you came back he was gone? [84]

A. Yes, sir; I guess he didn't hear me or heed me.

Q. Did you have any reason there that you wanted to arrange your kitchen?

A. Well, I wasn't fully dressed and had a baby crying and I couldn't very well let him in.

Q. That is the reason you refused him admittance or told him wait a while? A. Yes.

Mr. SLATTERY.—Objected to as leading.

The COURT.—Sustained.

Q. Do you remember when your husband was arrested?

A. He went to work the next day and when he was coming off shift two officers came right after

(Testimony of Mrs. Anthoney Carney.)
him and he set his bucket in the hall and they arrested him.

Q. Arrested him and took him from the building? A. Yes, sir.

Q. That was the following day? A. Yes, sir.

Q. Had you ever noticed this still in the east side of the building until the officers got there?

A. No, sir; not until Rodda opened the door.

Q. You saw the still that time? A. Yes, sir.

Q. Did you know before that time it was in the building? A. No, sir; I didn't.

Q. Know there was any mash in the east side of that building? A. No, sir; I didn't.

Q. Know there was any moonshine whiskey or liquor being made there? A. No, sir; I didn't.

Q. Do you know what became of the parties who were occupying that building at that time? Know where they went?

A. He was there about half an hour before the time they came and [85] I heard him in the hallway before when they opened the door and I went in after him and found a copper boiler in the clothes closet, not that (pointing to a still), and a coil something like that with it and a white pitcher with some liquid in it.

Q. Do you mean a wash boiler like the bottom of this?

A. No, sir; it was white outside and no cover at all on it.

Q. And something there with this coil?

(Testimony of Mrs. Anthoney Carney.)

A. Yes, sir; but not a boiler like that; that is he took a boiler out of there but not that.

Q. And had your husband access to these rooms at all during that month?

A. I could swear he never goes into them while rented unless there is something broken down or something too heavy to lift, a chimney or something.

Q. In other words repairs a man has to make as he goes in? A. Yes, sir.

Q. Who has control of the renting of those rooms?

A. I have these rented now to a man and woman.

Q. Who has charge of renting those rooms?

A. I have.

Q. Mr. Carney take any part in it, collecting any rent?

A. No, sir; he never bothers with it.

Cross-examination.

(By Mr. SLATTERY.)

Q. Of course you told him who is renting the place? A. Yes, sir.

Q. He owns the building himself? A. Yes, sir.

Q. He owned it of course during the month of April when the officers found the still, mash and moonshine whiskey? A. Yes, sir.

Q. And had owned it for some years before that? [86]

A. Yes, sir.

Q. Now, this particular room in which the still and mash was found there is only just a few feet

(Testimony of Mrs. Anthoney Carney.)

from the door of the rooms where you and Mr. Carney was living?

A. Across the hall to the other side of the house.

Q. Just a few feet across; it's in the same house?

A. Yes, sir.

Q. Under the same roof? A. Yes, sir.

Q. How wide is that hall?

A. I couldn't tell you.

Q. Just an ordinary hall? A. Yes, sir.

Q. And about how long is it, Mrs Carney?

A. Just a whole length of the house clean through.

Q. Is it as long as this room is wide?

A. From here to that gate or farther (indicating).

Q. The odor of the mash in there was very strong the time the officers came? A. I didn't get it.

Q. Didn't you get the odor of it? A. No, sir.

Q. Were you accustomed to it?

A. I am not accustomed to it.

Q. Isn't it a fact, Mrs. Carney, that you were at that time taking care of the still for your husband and isn't that the reason why you kept Mr. Bolton waiting twenty minutes on the front porch?

A. No, sir.

Q. That is the real reason is it not?

A. No, sir.

Q. You do admit, don't you, that the odor of the mash was very strong? [87]

A. I can't admit that.

Mr. BALDWIN.—Objected to. That's not her statement.

(Testimony of Mrs. Anthoney Carney.)

The COURT.—Overruled.

Q. Who was the fellow that you say the place was rented to where the still was?

A. A young man, light complected.

Q. What was his name?

A. Pat O'Donnell; he handed me twenty dollars for the room and asked me for the keys and I gave them to him.

Q. The door was unlocked when the officers were there?

A. I don't know that.

Q. Was the door unlocked when the officers went in where the still was?

A. I don't know; he took a handful of keys out of his pocket.

Q. Didn't you go into the room when the officers were there?

A. Yes, sir.

Q. Mrs. Carney, didn't you say something to one of the officers about not having a search-warrant?

A. I did.

Q. What did you say?

A. I said, "Who are you?" and he said, "I am an officer."

Q. What did you say about the search-warrant?

A. I don't remember saying anything.

Q. Didn't you say something to him about a search-warrant?

A. I don't remember. I asked him who was he and he said an officer.

Q. A moment ago you did say you said some-

(Testimony of Mrs. Anthoney Carney.)

thing to him about a search-warrant; what was it you said?

A. I didn't say.

Q. Did you say anything about a search-warrant?

A. No, sir.

Q. It was in the room when you asked him who he was?

A. Yes, sir; I said, "Who are you?" and he said, "An officer of the law." [88]

Q. Isn't it a fact that when the officers came up to the door one of them came to the front door and he told you he was a policeman, police officer?

A. No, sir; he was in the kitchen before I seen him; it was the gas man that wanted to see the meter came to the front door; the door was wide open when the officer came in.

Q. When the gas man and officers came, the gas man and one officer went to the back door?

A. They didn't come together; the meter man came first and went away and I didn't see the others which way they came because I was sitting in the rocking-chair in the kitchen until they were standing alongside of me.

Q. You were sitting in the kitchen when they came?

A. Yes, sir.

Q. How far is the kitchen from the room where the still was?

A. On the west side of the house.

Q. How many feet?

(Testimony of Mrs. Anthoney Carney.)

A. Quite a distance; there is three doors between me and the other kitchen.

Q. Tell us by objects here in the room?

A. About as far as my husband and three doors come between them.

Q. So that's about as far as you were from the room where the still was when the officers came?

A. Yes, sir.

Q. What did they do with the mash.

A. They asked me what to do with it to throw it in the sewer, and I told them it would block the sewer and they threw it in the back yard.

Q. What kind of a stove was there in the room where the still was?

A. A coal stove and gas stove, but the gas was not in use.

Q. Both in there?

A. Yes, sir.

Q. The coal stove hasn't been used lately? [89]

A. Yes, sir; used continuously to heat the rooms.

Q. Was it a stove that was large enough on which that still could rest?

A. Yes, he could set it on it.

Redirect Examination.

(By Mr. BALDWIN.)

Q. As I understand it the rooms were fitted up for housekeeping?

A. Yes, sir.

Q. A coal stove they could use or a gas stove they could use if they chose?

A. Yes, sir.

(Testimony of Mrs. Anthoney Carney.)

Q. And the party using the premises saw fit to use the coal stove?

A. Yes, sir.

Q. Now when the officers came you didn't go to the door at all, did you?

A. No, sir.

Q. The doors were open and they could walk in and did walk in?

Mr. SLATTERY.—Objected to as leading.

The COURT.—Sustained.

Q. When did you first notice the officers, where were they?

A. Standing in front of me, the meter man opening the cellar door.

Q. In what room was that?

A. In my kitchen.

Q. On which side of the building?

A. The west side.

Q. And then you asked them who they were?

A. I thought they were just going to see the meter; not until I seen the mash myself.

Mr. SLATTERY.—Objected to as repetition.

The COURT.—Sustained.

Q. Now Mrs. Carney, did you see O'Donnell after that time; did he come back after the 18th? [90]

A. No, sir; I went down to the city hall then and the children said he came in.

Mr. SLATTERY.—Objected to as not responsive to the question; move to strike the answer.

(Testimony of Mrs. Anthoney Carney.)

The COURT.—Sustained. The answer may be stricken.

A. No, I don't know.

Q. That is you don't know of your own knowledge?

A. No, sir.

Mr. SLATTERY.—Objected to as leading.

The COURT.—Sustained.

Q. You later rented the room to others?

Mr. SLATTERY.—Objected to as leading and immaterial.

The COURT.—Sustained. [91]

Testimony of Mrs. Gannon, for Plaintiff.

Mrs. GANNON, called as a witness, and after being duly examined, testified as follows:

Direct Examination.

(By Mr. BALDWIN.)

Q. You may state your name.

A. Mrs. Gannon.

Q. Where do you live?

A. 514 North Main Street.

Q. How long have you lived in Butte?

A. Thirteen years.

Q. Are you acquainted with Mrs. Carney, Mrs. Anthoney Carney, the witness who preceded you?

A. Yes, sir.

Q. How long have you known her?

A. About twelve years.

Q. Do you know the location of her residence at 205 West Quartz Street?

(Testimony of Mrs. Gannon.)

A. Yes, sir.

Q. How long have you known those premises?

A. About seven years.

Q. Were you familiar with those premises in April, 1922, that is April last year?

A. Yes, I go there to see them.

Q. Do you know who was using those three rooms on the east side or the rooms on the east side of the hall of that building in April last year?

Mr. SLATTERY.—Objected to as too indefinite as to time.

The COURT.—Modify your question.

Q. Did you know who was using the rooms on the east side of the hall in the early part of April last year?

A. I was over there one day and Mrs. Carney made me acquainted [92] with this fellow and said this is the fellow who was renting her rooms and I saw him there another time.

Q. Do you know when the place was raided?

A. No, I wasn't there, but I heard it.

Q. Do you know about what time it was, it was on the 18th of April, 1922.

A. Yes, sir.

Q. You say Mrs. Carney made you acquainted with this fellow before that time?

A. Yes, sir.

Q. And did you see him on those premises after she made you acquainted and before the 18th of April last year again?

A. Yes, sir; I just seen him there that one time.

Q. You saw him that one time?

(Testimony of Mrs. Gannon.)

A. Yes, sir.

Q. Do you know what the custom followed by Mrs. Carney was with reference to the use of those rooms on the east side, what was done with them?

Mr. SLATTERY.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Cross-examination.

(By Mr. SLATTERY.)

Q. You don't know, of course, whether it was the 10th of April or 20th of April when you met some fellow at that house?

A. Really, I don't know what date it was.

Q. Did you see this fellow you say you met in Mrs. Carney's on Mrs. Carney's side of the house?

A. I just happened to be going in the hall and he was coming out and Mrs. Carney made me acquainted.

Q. It was in the hallway?

A. Yes, sir. [93]

Q. You don't know, of course, when it was?

A. I know just a short time before the raid.

Q. A short time before the raid?

A. Yes, sir; a short time before that.

Q. When was the place raided, do you know?

A. Around the 18th I guess.

Q. Of what?

A. April. [94]

Testimony of William Colmer, for Plaintiff.

WILLIAM COLMER, called as a witness, and after being first duly sworn and examined, testified as follows:

Direct Examination.

(By Mr. BALDWIN.)

Q. You may state your name.

A. William Colmer.

Q. Where do you live?

A. 1009 Whitman Avenue.

Q. What is your occupation?

A. Soliciting clerk for Gallagher grocery.

Q. Does business in Butte, does it?

A. Yes, sir.

Q. How long have you held that place with company?

A. Well, I have been with him around three years ago the first of May.

Q. Working in that capacity for the Gallagher grocery company in April last year?

A. Yes, sir.

Q. As such solicitor did you have occasion to solicit orders at 205 West Quartz Street, Butte?

A. Yes, sir.

Q. Did you get orders from those premises in April, 1922?

A. Yes, sir.

Q. Did you solicit orders from Mrs. Carney?

A. Yes, sir.

Q. Did you get them?

(Testimony of William Colmer.)

A. Yes, sir.

Q. How long has Carney been dealing with you?

A. Dealing with me probably six years.

Q. He was living at the same place during that time?

A. Yes, sir. [95]

Q. Did you solicit anyone else in these same premises, 205 West Quartz Street in the month of April, 1922?

Mr. SLATTERY.—Objected to as too indefinite as to time.

Q. Do you know the date the officers went there and made a raid?

A. I wasn't there the date they made the raid, but I was there probably within a day or two afterwards.

Q. Taken as the date April 18th, 1922, as the time the officers went into the house and took a still, mash, etc., had you before that and in the month of April, 1922, solicited orders in the building from other than Mrs. Carney?

A. Yes, sir; I have.

Q. Did you get orders?

A. Yes, sir.

Q. From whom did you get those orders?

A. Pat O'Donnell.

Q. Which side of the building was O'Donnell on?

A. On the east side.

Q. East—there is a hall running through into the building?

A. Yes, sir.

(Testimony of William Colmer.)

Q. Which side of that hall did Carney live in those years?

A. Carneys lived on the west side always.

Q. During those six years and up until April 18th, 1922, what was done with the rooms on the east side of the hall?

A. They always been rented.

Q. You solicited those rooms for six years?

A. Yes, sir.

Q. Got orders from them as well as Carneys?

A. Yes, sir; there has been several different parties in there.

Q. You say you sold to Pat O'Donnell in the early part of April?

A. I sold him in April.

Q. Did you sell him materials up to approximately the 18th day?

A. I couldn't say definitely what date it was because he always [96] paid cash, but I know I sold him in April.

Q. He had no account and was a cash customer?

A. Yes, sir.

Mr. SLATTERY.—Objected to as leading.

The COURT.—Sustained.

Q. You were not present the time the officers raided it?

A. No, sir.

Q. Ever see a still there?

A. No, sir; I never did.

Q. You were in that building every day soliciting?

A. Not every day.

(Testimony of William Colmer.)

Q. How often in the building?

A. Once a week, always.

Q. Ever notice any smell of mash or anything like that?

A. I never have; no, sir.

Q. Did you see or smell or hear anything there to cause you to believe they were making moonshine in the premises?

Mr. SLATTERY.—Objected to as leading.

The COURT.—Sustained.

Cross-examination.

(By Mr. SLATTERY.)

Q. Are you familiar with the odor of corn mash in the state of fermentation?

A. Yes, sir; I am.

Q. Smelled it going around the homes here in Butte?

A. I wouldn't say it is in the homes, but I smelled wet corn lots of times.

Q. Do you know what corn in the state of fermentation is?

A. I couldn't exactly say, but I seen wet corn.

Q. You are testifying only from memory in respect to having been there from the early part of April last year?

A. Yes, sir. [97]

Q. You wouldn't have to look up records?

A. I wouldn't have to look up records; I know I made it every week in six years.

Q. You wouldn't swear you took orders from Pat O'Donnell in the week from the 11th to the 18th of April, 1922?

(Testimony of William Colmer.)

A. I couldn't swear to that, no.

Q. You wouldn't swear to that?

A. I wouldn't swear what week it was.

Q. This house the Carneys own is a small house, is it not?

A. No, sir; I would call it a good size house.

Q. Its—does the hallway run the length of it?

A. Yes, sir.

Q. How long is the hallway?

A. I would judge maybe eighteen or twenty feet.

Q. That runs the length of the house?

A. Not the exact length; it runs in and there is a toilet here and comes down here (indicating).

Q. What would you say the outside dimensions of the house?

A. Thirty feet.

Q. Square?

A. Thirty feet through the hall—on the outside of the house?

Q. Yes.

A. I couldn't tell; they are large size rooms all of them and there is five of them in there.

Q. The hallway is about how wide?

A. I should judge about three feet and a half or four feet.

Q. Doors opposite each other?

A. Not exactly.

Q. Very nearly?

A. Close; yes, sir.

Q. So that a strong odor of mash in any of those

(Testimony of William Colmer.)

rooms there would be very apparent throughout the hallway? [98]

Mr. BALDWIN.—Objected to as calling for a conclusion.

The COURT.—Sustained.

Q. You are not swearing this still, mash and moonshine, the seventy gallons of mash were not found in the Carney home on the 18th of April?

A. No, sir.

Redirect Examination.

(By Mr. BALDWIN.)

Q. But you know the Carney home was on the west side of the hall?

A. Yes, sir. [99]

Testimony of Martin Walsh, for Plaintiff.

MARTIN WALSH, called as a witness, and after being first duly sworn and examined, testified as follows:

Direct Examination.

(By Mr. BALDWIN.)

Q. You may state your name?

A. Martin Walsh.

Q. Live in Butte?

A. Yes, sir.

Q. How long have you lived here?

A. Twelve years.

Q. Acquainted with the defendant Anthoney Carney?

A. Yes, sir.

(Testimony of Martin Walsh.)

Q. How long have you known him?

A. About twelve years.

Q. Known him twelve years?

A. Yes, sir.

Q. Are you acquainted with the place he lives at 205 West Quartz Street?

A. Yes, sir.

Q. How long have you been acquainted with those premises?

A. About six years.

Q. Now, Mr. Walsh, were you acquainted with those premises in April, 1922?

A. Yes, sir.

Q. Do you know what was done with the premises that month, with the east side of the building, the portion east of the hallway?

A. Yes, sir.

Q. What was done with them, that is who used the rooms on the east side of the hall?

A. A fellow named Pat O'Donnell.

Q. Did you see him there in April, 1922, and before the 18th? [100]

A. Yes, sir.

Q. Do you—were you present at the time the officers were there or do you know when they were there? A. No, sir.

Q. But you know before the 18th that O'Donnell was using the east side of the building?

A. Yes, sir.

(Testimony of Martin Walsh.)

Cross-examination.

(By Mr. SLATTERY.)

Q. Were you in the kitchen on the opposite side of the hall from where the Carneys purported to live? A. No, I never was in that kitchen.

Q. Never went in on that side of the house at all?

A. No, sir.

Q. You been out to Carney's?

A. No, sir; I never.

Q. Were you there just shortly before the 18th of April last year? A. Yes.

Q. How long before the 18th? A. In March.

Q. You were there in March?

A. March and April; I be there two or three times a week.

Q. Calling on Carney? A. Yes, sir.

Q. Did you help to take and put a fifty gallon barrel in his house? A. No, sir.

Q. Did you help him take a still up to his house?

A. No, sir.

Q. How far do you live from Carney's place or were you living that time?

A. I lived on North Main Street.

Q. How far from Carney's place? [101]

A. Five blocks.

Q. You went there two or three times a week?

A. Yes, sir.

Q. Generally brought something away with you when you came away, didn't you? A. No, sir.

(Testimony of Martin Walsh.)

Redirect Examination.

(By Mr. BALDWIN.)

Q. What was your purpose of visiting a friendly call?

Mr. SLATTERY.—Objected to as immaterial.

The COURT.—He may answer.

A. Just to see Carney.

Q. Counsel has asked you if you were in the kitchen presumed to be occupied by Carney; just tell what portion of that building Carney used for whom during the last six years?

A. He used the west side.

Q. Did Carneys ever use the rooms or live on the east side during that time?

A. No, sir, not that I know of. [102]

Testimony of Joe Nevin, for Plaintiff.

JOE NEVIN, called as a witness, and after being first duly sworn and examined, testified as follows:

Direct Examination.

(By Mr. BALDWIN.)

Q. You may state your name. A. Joe Nevin.

Q. Do you live in Butte? A. Yes, sir.

Q. How long have you lived here?

A. Thirty-five years.

Q. What is your occupation?

A. Assistant foreman of the Bell and Diamond Mines.

Q. How long have you held that place?

A. About six years.

(Testimony of Joe Nevin.)

Q. Are you acquainted with Anthony Carney?

A. Yes, sir.

Q. How long have you known him?

A. About thirteen years; thirteen or fourteen years.

Q. During the month of April do you know where Mr. Carney was employed? A. Yes, sir.

Q. Where? A. At the Diamond Mine.

Q. Working for you? A. Yes, sir.

Q. And you kept his time, did you?

A. Yes, sir.

Q. Did he miss any shifts in April, 1922?

A. He was turned over to the shift boss on the 11th day of April.

Q. By—up to that time he missed no time?

A. No, sir.

Q. Do you know his reputation for truth, honesty and integrity? [103]

A. Always have found him a good man.

Q. How long has he been working under your direct supervision?

A. Since the 26th of April; that's the time he went bossing the second time; he bossed before for us.

Q. How many years has he worked altogether under your direction?

A. I think about twelve years.

Q. Has he been a steady workman?

A. Yes, sir.

Q. And what position does he occupy at the Bell mine this time?

(Testimony of Joe Nevin.)

A. The present time he is a shift boss; at the Diamond mine.

Q. What was his position in April, 1922?

A. Prior to going shift boss?

Q. Yes.

A. He was a pipeman.

Cross-examination.

(By Mr. SLATTERY.)

Q. You say from the 11th of April, 1922, he became a shift boss? A. No, the 26th of April.

Q. Was he working between the 11th and 18th of April, 1922?

A. Yes, sir; a shift boss was put on and he was turned on to shift boss Belangie on the 11th day of April.

Q. He wasn't under your direct supervision?

A. Yes, sir; he was as a day shift man.

Q. His duties out there at the mine lasted only eight hours a day? A. Yes, sir.

Q. That gave him sixteen hours to put in at home if he wanted to? A. Yes, sir.

Q. Then he had twice as much time to do something at home as he had at the mine?

A. Sure. [104]

Testimony of Anthoney Carney, in His Own Behalf.

ANTHONEY CARNEY, called as a witness, and after being first duly sworn and examined, testified as follows:

(By Mr. BALDWIN.)

Q. You may state your name.

(Testimony of Anthoney Carney.)

A. Anthoney Carney.

Q. Live in Butte? A. Yes, sir.

Q. How long have you lived in Butte?

A. About thirteen or fourteen years.

Q. Married? A. Yes, sir.

Q. Living with wife and children? A. Yes, sir.

Q. How many children have you?

A. I got five.

Q. Of what ages; what is the oldest and youngest age?

Mr. SLATTERY.—Objected to as immaterial.

The COURT.—Answer briefly.

A. Oldest is ten and the youngest is six months.

Q. During the last six years where have you been living? A. 205 West Quartz Street.

Q. During that time what have you been doing for a living? A. Mining.

Q. Working at what place?

A. Well, different mines; the Original, Bell and Diamond.

Q. And what are you doing now for a living?

A. Shift boss.

Q. At what place? A. The Bell mine.

Q. Ever been in trouble of any kind before this case came up? A. No, sir.

Q. Now, Mr. Carney, what is the arrangement of the building in [105] which you live?

A. Well there is—the building faces south, north and south and there is a hallway running from the north to the south and there are three rooms on the west side and two on the east side with bathroom

(Testimony of Anthoney Carney.)

and toilet and each room opens to the hallway and the hallway runs from the front into the back.

Q. Have you ever lived in the east side?

A. No, sir.

Q. Have you ever used the rooms on the east side of that hall except for renting?

A. That's all to rent.

Q. Were those premises, that is the two rooms on the east side of the hall rented in April, 1922?

A. Yes, sir.

Q. Who had charge of the renting of those rooms? A. Mrs. Carney had.

Q. Did you pay any personal attention to it?

A. Very little.

Q. Who was occupying those rooms to the east of the hall in April, April 18th, 1922?

A. This man O'Donnell.

Q. Did you rent the premises to him?

A. No, I didn't rent them.

Q. Do or did you know he was making moonshine in those premises? A. I should say not.

Q. Did you know there was a still in the building at all? A. No, sir.

Q. Did you know there was any mash in the building? A. No, sir.

Q. Now, Mr. Carney, were you home the time the officers called on the 18th? A. No, sir. [106]

Q. Where were you at that time?

A. I was at the mine working.

Q. At work? A. Yes, sir.

(Testimony of Anthoney Carney.)

Q. And when you returned home what time was it? A. About five o'clock in the evening.

Q. Did you see any officers that day? A. Yes.

Q. Who did you see?

A. Mr. Rodda that testified here and Gerry.

Q. Rodda and Gerry came up on the 18th?

A. Yes, sir; after I came off shift they were waiting and came into the house right after me.

Q. Did you have a talk with Gerry and Rodda?

A. They asked me about these premises and I told them they were rented.

Q. Tell them who rented them? A. Yes, sir.

Q. Tell where he was working?

A. I told them what he told me that he was working at the Mountain View mine.

Q. And did they arrest you that evening?

A. No, sir.

Q. Did you see Fairchild there at all?

A. No, sir; this is the first time I seen him right here.

Q. When were you arrested, Mr. Carney?

A. I believe it must be two days after.

Q. Have you ever talked to Gerry about this case or with Rodda or Fairchild since the time you were arrested? A. No, sir.

Q. Has anyone talked to them with your knowledge or consent? A. Not that I know of. [107]

Cross-examination.

(By Mr. SLATTERY.)

Q. You were maintaining this house at 205 West

(Testimony of Anthoney Carney.)

Quartz Street on or about the 18th of April last year?

Mr. BALDWIN.—Objected to as immaterial; not proper cross-examination.

The COURT.—Ask him if he owned it.

Q. You owned it did you not? A. Yes, sir.

Q. Kept it in repair? A. Yes, sir.

Q. And occupying one side? A. Yes, sir.

Q. In going—in entering your house did you generally go in the front door or back door?

A. Sometimes either way.

Q. You would pass the kitchen where the still was? A. Yes, sir.

Q. How close would you come to that door?

A. Come right by it.

Q. Almost touch it going by?

A. Yes, sir; the hall there about four feet wide.

Q. You learned the still was in the house?

A. Yes, I found it out.

Q. Who told you that? A. Gerry and Rodda.

Q. Until they told you you never suspected the still there? A. No, sir.

Q. Did they tell you also there were seventy gallons of mash? A. They told me they found it.

Q. You never smelled mash?

A. No, sir. [108]

Q. You don't have any trouble with your sense of smell?

A. Well, it isn't the very best.

Q. How long has it been bad?

A. It never was good.

(Testimony of Anthoney Carney.)

Q. Did it surprise you to learn that that still there and seventy gallons of mash and moonshine whiskey were in a room the door of which you almost touched with your elbow two or three days in passing it? A. Yes, sir; it surprised me.

Redirect Examination.

(By Mr. BALDWIN.)

Q. Now, when you went in and out that door wasn't open?

Mr. SLATTERY.—Objected to as leading.

The COURT.—Sustained.

Q. Now, Mr. Carney, when you went in and out from work and in and out from your home what was the condition of that door leading into the kitchen on the east side with reference to being closed or open?

Mr. SLATTERY.—Objected to as too indefinite.

The COURT.—Overruled.

A. As a rule that side of the house is always closed.

Q. Did you ever have occasion during the month of April, 1922, to go into *the* that side of the house?

A. No, sir, not since it was rented by this man O'Donnell.

Q. Do you go into those rooms any time except between tenants and excepting fixing the rooms?

A. No, sir; never, unless something is broken down.

Q. When you went home did you see any still in the building; that is the night the officers were there? A. No, sir.

(Testimony of Anthoney Carney.)

Q. Did you see a bottle of so-called moonshine?

A. No, sir; that's the first I seen of it. [109]

Q. Do you know that was in the building prior to that time? A. No, sir.

Q. See a barrel of any kind there?

A. No, sir.

Q. See any mash in that building? A. No, sir.

Q. And did you authorize anybody to make any mash or moonshine? A. No, sir. [110]

Testimony of Charles Rodda, for Plaintiff (Recalled).

CHARLES RODDA recalled to witness-stand.

(By Mr. BALDWIN.)

Q. You saw Carney on the night you made the raid? A. No, sir.

Q. What night was it you made the arrest?

A. On the night—it was the 18th or 17th; I think on the 18th, yes, sir.

Q. Did you arrest him the night you found the still in these premises?

A. No, sir; the next night.

Q. Was Fairchild there when you made the arrest? A. No, sir.

Q. Who assisted you in making the arrest?

A. Officer Gerry.

Q. And at that time Mr. Carney was coming off shift. A. Yes, sir.

Mr. SLATTERY.—No cross-examination.

Mr. BALDWIN.—That's the defendant's case.

Mr. SLATTERY.—We will recall Charles Rodda.

Testimony of Charles Rodda, for the Government (Recalled).

CHARLES RODDA recalled to stand.

(By Mr. SLATTERY.)

Q. Mr. Rodda, when you went up to the doorway or door in this house on the occasion you testified to was the door open or closed?

A. The door was closed.

Q. What did you do?

A. Knocked at the door.

Q. Who came to the door? A. Mrs. Carney.

Q. Is that the first place in or about that house you saw her? A. Yes, sir.

Mr. BALDWIN.—Objected to as unnecessary repetition and not proper rebuttal. [111]

Q. Let me ask you what, if anything, did she say to you about a search-warrant?

A. She didn't say anything about the search-warrant until after we got the still and mash.

Q. What did she say then?

A. She said have you got a search-warrant and I said no, lady, we got a still.

Q. Was she present to see you take the still?

A. Yes, sir.

Q. How close did she stand?

A. Right close by me; probably two feet away.

Q. Did she make any explanation to you about the presence of the still or mash or moonshine in the house? A. No, sir.

(Testimony of Charles Rodda.)

Q. She didn't say anything about any man by the name of O'Donnell?

A. After a while she did.

Q. Was that before or after she asked if you had a search-warrant? A. After.

(By Mr. BALDWIN.)

Q. She told you that time didn't she the man named O'Donnell was renting those premises?

A. Yes, sir.

Q. She told you where he had told her he worked?

A. I believe she said he worked at the mine some place.

Q. During that time she told you she didn't know anything about the still, moonshine or mash, didn't she? A. She did.

Q. She told you that O'Donnell had those rooms and she had nothing to do with them?

A. She said a man named O'Donnell rented those rooms.

Q. In what state of fermentation was that mash?

A. I would say it was ready to run through a still; a strong odor. [112]

Q. And how long would you say it takes fermentation to go to give off the odor?

A. All the way from eight to twelve days.

Q. The odor becomes strong when it's about ready for distillation? A. Yes, sir.

Q. Prior to that time it doesn't give out much odor?

A. When we got to the front door we could smell it.

(Testimony of Charles Rodda.)

Q. You have been searching for stills and mash for a good many years?

A. When we get a complaint.

Q. You have your sense of smell developed so you can detect such odor?

A. Yes, sir; I did at that place.

Mr. SLATTERY.—Objected to as calling for a conclusion.

The COURT.—He may answer.

Q. Well, you been searching and as you search for these illicit stills you have become acquainted with the odor and know what odor is?

A. Yes, sir.

Mr. SLATTERY.—Objected to as argumentative.

The COURT.—Sustained.

(By Mr. SLATTERY.)

Q. You say the odor was very strong?

A. Yes, sir.

Mr. SLATTERY.—The Government rests.

Whereupon the testimony was closed. [113]

The above and foregoing is all of the evidence offered and introduced and all of the testimony given on the trial of said cause.

That after the conclusion of the testimony as aforesaid, the case was argued by the United States Attorney and counsel for the defendant and thereafter the Court charged the jury and exceptions were taken to the charge by the defendant as follows: [114]

Charge to the Jury.

The COURT.—Gentlemen of the jury, in all these cases you will remember that you and I have a divided function and duty. Mine is to tell you what the law is that applies to the case and you always accept the law from the court; but your function and duty is to determine the truth where the facts are in dispute and where different inferences may be drawn. Remember while you take the law from me you don't take the facts from me. I might tell you out and out whether or not I think the defendant guilty, I may comment on witnesses and evidence, but even if I did it wouldn't bind you to come to the same conclusion nor would it be said to bring you to the Court's conclusion but only to help you to reason to a correct decision. The information in this case is in five counts and charges the defendant with various violations of the National Prohibition Act; that Act as you remember was passed pursuant to constitutional amendment in order to prevent the use of intoxicating liquor for beverage purposes. Whether we like it or not as long as it is written in the Constitution of the country and the law has been passed by Congress it is the duty of every decent man not only to obey it but especially when he is in the jury box to enforce it. When I say it's his duty, that does not mean that every time a man is charged you must convict him. This law is enforced like any other law; this defendant is charged and put on trial and the jury

hears the evidence, and if from it they are satisfied he is guilty as charged beyond a reasonable doubt they should convict him and if they are not so satisfied they should acquit him; and whichever verdict you render whether of conviction or acquittal if it's your honest judgment and conclusion your are enforcing this law. The violations charged are that he manufactured, the defendant, moonshine whiskey without a permit, in the first count; the second count is manufacture without making record; the third count is he possessed intoxicating liquor intending to use it in violation of the Prohibition Act; the fourth count is possessed property designed for the unlawful [115] making of whiskey; and the fifth count is he maintained a common nuisance in his premises in that intoxicating liquor was kept and manufactured contrary to the National Prohibition Act. The Act provides that no one can make intoxicating liquor without permit or record —there are still lawful ways to manufacture intoxicating liquor, lawful uses for it, but in order to guard against the unlawful ways of manufacture and unlawful use the law requires that makers get a permit. Defendant had no permit or if he had he would show it to you. So if there is no direct evidence of no permit it need not confuse you. Anyone who keeps that sort of stuff in his premises, under this law is maintaining a common nuisance. There are penalties for these offenses ranging from fine to a fine or imprisonment and a fine and imprisonment, depending upon the circumstances of the case. You are never to be influenced by the

punishment, that's for the Court. Avoid sympathy either one way or the other and perform your duty. In response to this information the defendant pleads not guilty. Under the law he is presumed to be innocent; that doesn't mean that you believe him innocent. It simply means that not knowing anything about it we presume he is innocent until he is proven guilty beyond a reasonable doubt. The burden is on the Government in every criminal case to prove the defendant guilty beyond a reasonable doubt before you are justified in finding him guilty. The defendant is never required to prove himself innocent. After all the question is not is he innocent, but is he proven guilty beyond a reasonable doubt. Remember another thing, the Government isn't bound to prove him guilty to an absolute certainty, not beyond all doubt, but only beyond any reasonable doubt. After reviewing the facts and circumstances and the direct testimony of the witnesses in the case you may have some doubt as to the guilt of the defendant but unless a doubt is reasonable in view of all the circumstances you are bound to find him guilty; at the same time you may have a doubt of his innocence but that does not enable you or [116] justify you to find him guilty unless you have no reasonable doubt of his guilt. A reasonable doubt may be defined after this fashion; if after you have reviewed all the evidence you do not have a judgment that persists in staying with you, that to a very high degree of probability the defendant is guilty, you have a reasonable doubt and must acquit him. On the other

hand if after reviewing all the evidence and circumstances your judgment persists that to a very high degree of probability the defendant is guilty you have no reasonable doubt and you are bound to convict him. When I say bound, Gentlemen, there is no compulsion from the Court or anyone; the only things binding upon you are your oath, duty, honor and conscience. You are officers of the Court as you sit there, sworn to perform your duty as honest and conscientious men. You are the exclusive judges of the weight of the testimony and credibility of the witnesses. You see the witnesses, you hear them and observe and take note of their attitude and demeanor. Are they frank and fair or inclined to conceal or distort or misrepresent; do they contradict themselves or are they contradicted by others whom you prefer to believe; are they contradicted by circumstances which so far appeal to your reason that you prefer to believe them rather than the direct statements of any number of witnesses; have they an interest in the case. Circumstances may speak truly where witnesses are testifying untruly. There is presumption that the witnesses speak the truth; in other words the jury may presume that though you may see reason to deny the benefit of that presumption to any witness. It may extend to the defendant, but never forget he is the defendant. He is the vitally interested person in the case; he is charged with a serious offense, consequences grave enough if he is convicted. In judging his credibility and that of his wife, whether their interest that has caused them to depart

from the truth to deceive you, to conceal the truth and to raise in your mind any reasonable doubt and secure a verdict of acquittal; whether they departed from the truth with that end in view is for your guarded [117] and serious consideration. The Court doesn't say they have; it says for you to decide if they have. The evidence in this case is practically all circumstantial; that is to say this—that while this unlawful accumulation of stills and liquor, moonshine, were found fairly at the door of the defendant and in his own house, no one saw him make the liquor, you have only the circumstances to prove whether it's his property and whether he made liquor; no one has testified he owned it or made it. The law is in respect to circumstantial evidence that where circumstances justify the belief in the minds of the jury that the defendant is guilty beyond a reasonable doubt they have a right to rely on those circumstances and find him guilty. On the other hand if in the light of these circumstances, taking a reasonable view of the whole case, of all the circumstances, and not attempting to avoid the duty of fair consideration, if all those circumstances are as consistent that he is innocent as that he is guilty, it would be your duty to find him not guilty. Now Gentlemen, as to evidence. The meter man goes there and asks to be admitted as he has a right to; he is met with an objection at the door and the reason for which he didn't know; you have heard the wife's statement as to why she didn't allow him; he says he stood there twenty minutes, she didn't say how long; he went away and he reports to the

officers; what he reports we are not interested in, but at any rate all go back together, and here comes the first contradiction between the officers and the wife; Rodda says he knocked and in a minute the witness came to the door. She testifies she sat in the kitchen with the baby and saw nobody or heard nobody until the officers came in the kitchen. Rodda said the officers looked through the door into this east side kitchen nearly opposite the west side of the kitchen, was standing half open or ajar to some extent and Rodda pushes it open and finds the still, intoxicating liquor, moonshine, and mash which Rodda says was fermenting and was ready to distill. [118] In these rooms no clothing, nothing to indicate occupancy other than a bed, no kitchen utensils, and nothing to show in the way of using for food, no trunk, no shoes or hats, just that bed in there with clothing upon it. While taking it out apparently nothing was said by his wife, no excitement so far as the evidence shows, didn't say anything, made no objections. But after getting it out she begins to ask about a search-warrant. She first testified she didn't and afterwards she said she didn't remember. The officers said she did. If defendant and his wife were not concerned, why wouldn't she be anxious to have it carried out instead of inquiring for a search-warrant? At that time after removing it had taken some little time, she first began to make an explanation and began to account for it by a man named O'Donnell who rented the rooms; next day the officers arrested the defendant. He testified that when they ar-

rested him was the first time he heard the still was there or the mash was there. Assuming that the still and mash were not his do you believe his wife didn't tell him when he came home that night or the day when it was carried out of the premises? Yet he says he hadn't heard of it until Rodda told him; he denies knowledge of still and mash in the premises, that they were rented by O'Donnell and he didn't know anything about it; hadn't smelled anything and produces witnesses whose testimony tends to show there was a man there named O'Donnell. Now, then, Gentlemen of the jury, if the defendant had no part in carrying on these operations there, he wouldn't be guilty merely because a tenant used the premises for these unlawful purposes. But you ask yourself whether it is not likely that this O'Donnell, if such a man existed, and it looks fairly reasonable that he did, and this defendant were in partnership in carrying on these operations; is it reasonable that a bootlegger and moonshiner would rent an apartment in the situation these were, having all appliances such as mash and still, having it in operation across the hall with children running around, unless he and the landlord or owner were jointly interested, [119] working together in violation of the law? You are not to be hoodwinked and bamboozled by anybody, not by unreasonable testimony if it is unreasonable. Remember the witnesses on either side can swear that black is white if they think they can cause you to credit it or to entertain a reasonable doubt, but you are not to be gulled. As my honored

predecessor Judge Knowles said, you are not to believe a thing is so simply because someone swears it's so, and if a witness testifies that down the street he saw an elephant climb a telephone pole, you are not bound to believe it's a fact, even though he shows you the pole. You determine the true and false no matter from what witness the evidence comes. Now Gentlemen of the jury, that's the case for you; you have heard it all; you are men of common sense and reason, draw upon your own experience, conceive what your own conduct would be if across your hallway from your kitchen door of your own home a tenant set up a moonshine outfit and make moonshine whiskey, would you know it, how long would you tolerate it? Isn't it the reasonable fact to assume that if there was such a man O'Donnell he and the defendant were in cahoots in carrying on that unlawful business? Before you can find defendant guilty of making, you must be satisfied from the circumstances that the liquor was made there by the defendant or someone associated with him. You have a right to conclude that he and O'Donnell were partners but the Court doesn't tell you you ought to so determine. As a matter of law the Court tells you the inference from the circumstances is warranted, but whether you will draw the inference depends upon your judgment entirely. The still and liquor were found there, you have a right to infer it was made there. The law will warrant you in it though the law doesn't say you are bound to. That's the case. Remember the defendant is presumed to be not guilty, presumed to be innocent;

and unless from the evidence and circumstances you believe him guilty beyond reasonable doubt of some of these charges you must acquit him. You might convict of some and acquit of others or convict of all or acquit of all. Unless you believe beyond a reasonable [120] doubt he is guilty as charged in one or more counts, you must acquit him; and on the other hand if you believe he is guilty as charged you will find him guilty. Has counsel any objections or exceptions to the instructions of the Court.

By Mr. BALDWIN.—The defendant excepts to that portion of the instruction by the Court in commenting upon the witness saying that the jury is not to be hoodwinked or bamboozled by such testimony; also to that portion of said instruction referring to defendant's witnesses, that the jury are not to be gulled by such testimony, as prejudicing the rights of the defendant, causing the jury to believe that the defendant would try to bamboozle and hoodwink, and prejudicial to his interests; also to that portion of the instruction of the Court where the Court says that the jury has a perfect right to infer that the defendant and O'Donnell were partners in that it is not based upon the evidence in the case, or law and error of the Court in this, that it is for the jury to determine from the facts whether there was in fact the existence of those facts necessary to a partnership between O'Donnell and the defendant in this case.

The COURT.—You remember, Gentlemen of the jury, these objections are not argumentative but

these are simply to save the record for the benefit of the defendant. [121]

That thereupon the jury retired in charge of a sworn bailiff to deliberate upon their verdict and later and on May 15, 1923, returned into open Court with their verdict, which after the title of court and cause, was in words and figures as follows:

"We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the information on file herein as to counts three, four and five and not guilty as to counts one and two.

HENRY WILLIAMS,
Foreman."

And said verdict was thereupon received and filed of record in the above-entitled Court and cause.

That on May 16, 1923, sentence was rendered and judgment entered against the defendant as follows:

JUDGMENT.

"The United States Attorney with the defendant and his counsel present in Court. The defendant was thereupon duly informed by the Court of the nature of the charge against him as appears in counts 3, 4 and 5 of the information herein, and of his arraignment and plea of not guilty and of his trial and the verdict of the jury of guilty as to counts 3, 4 and 5 of the information. And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing

to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendant having been duly convicted in this court of the offense of unlawfully having and possessing intoxicating liquor and property designed for the manufacture of intoxicating liquor intended for use in violation of the National Prohibition Act, and unlawfully maintaining a common nuisance in violation of the National Prohibition Act committed on the 18th day of April, 1922, at Butte, in the State and District of Montana, as [122] charged in counts 3, 4 and 5 of the information herein;

It is therefore considered, ordered and adjudged that for said offense, you, the said Anthony Carney, be confined and imprisoned in the county jail in Butte, Montana, for the term of seven months and that you pay a fine of Two Hundred Fifty Dollars and costs taxed at $39.70, and that you be confined in said county jail until said fine is paid or you are otherwise discharged according to law.

Thereupon for good cause, court ordered that commitment herein be stayed for 24 hours pending the filing of a motion by defendant for a new trial.

Judgment rendered and entered May 16, 1923.

C. R. GARLOW,
Clerk.
By H. H. Walker,
Deputy."

That on May 17, 1923, the defendant duly served and filed his motion for new trial in the above-

entitled court and cause, said motion for new trial omitting the title of court and cause is as follows:

(Title of Court and Cause.)

Motion for New Trial.

Comes now the defendant in the above-entitled action and moves as follows:

I.

That the verdict of guilty on the third count contained in the information on file herein on May 15, 1923, be set aside and a new trial on said count of the information allowed on the grounds and for the reasons following:

1. That the charge contained in said count of said information does not state facts sufficient to constitute a public offense.

2. That the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America.

3. That said third count of said information does not include any defensive negative averments or supply the want thereof [123] by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act.

4. That because the charge contained in said count of said information does not state facts sufficient to contstitute a public offense, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

5. That because the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

6. That because of the fact that said third count of said information does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful," as required by Section 32 of the National Prohibition Act, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

7. Errors in law occurring at the trial as follows:

The Court erred in overruling defendant's objections to the testimony given by the witness Rodda relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in overruling defendant's objections to the testimony given by the witness Fairchild relating to conversations had by him with defendant's wife in the absence of the defendant.

The Court erred in admitting the testimony of the witness Rodda concerning statements to have been made by the defendant's wife concerning the necessity for and want of a search-warrant as the basis for searching the premises mentioned and described in the information herein. [124]

The Court erred in denying defendant's motion

for a directed verdict made at the conclusion of the Government's case.

The Court erred in making the comment that it did make in overruling defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in submitting the charge contained in said count of said information to the jury.

8. While charging the jury, the Court erred as follows:

In its definition of a reasonable doubt.

In its statement of the law relating to the presumption of innocence.

In failing to tell the jury that the presumption of innocence is an instrument of proof created by law in favor of one accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created.

That this presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

That this legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party charged with crime is entitled.

That the presumption of innocence is evidence in favor of the accused which must be borne in mind by the jury and considered by them with all of

the other evidence in the case in arriving at their verdict.

That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

In charging that the presumption of innocence is merely [125] a status created by law at the commencement of the trial.

That in failing to charge the jury that to overturn the presumption of innocence, there must be evidence of guilt carrying home a degree of conviction short only of absolute certainty.

In stating that a statement said to have been made by the defendant's wife in his absence, concerning the necessity of a search-warrant authorizing the searching of the premises described in the information herein, was an admission of guilty knowledge, from which the jury might infer that the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

In stating that the evidence was such as to require the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

That in stating that the jury had a perfect right to infer from the evidence that the defendant and Joe O'Donnell were partners in connection with the matters charged in said count of said information.

In stating that the defendant testified that he did not know anything about the search of the premises described in the information until he was told about it by the officers at the time they arrested him.

In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

In using the word "bamboozled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably [126] to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury and were not worthy of any credit whatsoever.

In using the word "hoodwinked" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such

as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and were not worthy of any credit whatsoever.

In using the word "gulled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the court, the witnesses for the defendant were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were endeavoring to treat the members of the jury as simple, credulous [127] persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and were not worthy of any credit whatsoever.

In failing to state definitely the elements essential to the commission of the crime charged to have been committed in the third count of the information.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the third count of the information.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the third count of the information would be justified.

In charging generally on all of the counts contained in the information herein and definitely on none.

In submitting the charge contained in the third count of the information and the charge contained in the fifth count of the information for the reason that as a result thereof defendant was twice put in jeopardy for the same offense.

In failing to instruct the jury;

That circumstantial evidence should be acted upon with caution.

That before a conviction can properly be had on circumstantial evidence, all the essential facts must be consistent with the hypothesis of guilt as that to be compared with all the facts proved.

That the facts must exclude every other theory but that of guilt and that the facts must establish such a certainty of guilt of the accused as to con-

vince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point [128] so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself.

9. That the evidence is insufficient to justify the verdict of guilty on said count of said information for this:

That there is nothing in the evidence showing or tending to show to whom the liquor said to have been found in the premises described in the information herein, belonged.

That there is nothing in the evidence tending to show that the liquor mentioned in said count of said information belonged to the defendant.

That there is nothing in the evidence tending to show, how, when or by whom the liquor mentioned in said count of said information was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was ever the owner of, in possession of, or in control of said liquor, or that he had any knowledge concerning its existence, or the place where it was kept.

That there is nothing in the evidence tending to show that if the liquor mentioned in said count of said information belonged to the defendant, he was not legally permitted to possess the same.

That unless it be conceded that the testimony given on the part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found, is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing in the evidence tending to show that said liquor was not kept in defendant's private dwelling for the personal consumption of the defendant and his family residing in such dwelling and to his *bona fide* guests when entertained by him therein.

That if it be conceded that the testimony given on the [129] part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing in the evidence tending to show that the defendant had any knowledge of, title to, or control over such liquor.

That there is nothing in the evidence tending to show that the liquor mentioned in the third count of said information and stated to have been intended for use in violation of Title II of the National Prohibition Act was kept in the premises mentioned in said information or sale, barter or any other commercial purpose.

That there is nothing in the evidence tending to show that any intoxicating liquor had ever been sold, bartered or used for any commercial purpose in or on the premises described in the information herein or by the defendant at any time or place.

II.

That the verdict of guilty on the fourth count contained in the information on file herein on May 15, 1923, be set aside and a new trial on said count of the information allowed on the grounds and for the reasons following:

1. That the charge contained in said count of said information does not state facts sufficient to constitute a public offense.

2. That the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America.

3. That because the charge contained in said count of said information does not state facts sufficient to constitute a public offense, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

4. That because the facts stated in said count of said information are not sufficient to show a violation of any criminal law [130] of the United States of America, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information.

7. Errors in law occurring at the trial as follows:

The Court erred in overruling defendant's objections to the testimony given by the witness Charles Rodda relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in overruling defendant's objections to the testimony given by the witness Fairchild relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in admitting the testimony of the witness Rodda concerning statements to have been made by the defendant's wife concerning the necessity for and want of a search-warrant as the basis for searching the premises mentioned and described in the information herein.

The Court erred in denying defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in making the comment it did make in overruling defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in submitting the charge contained in said count of said information to the jury.

8. While charging the jury, the Court erred as follows:

In its definition of a reasonable doubt.

In its statement of the law relating to the presumption of innocence.

In failing to tell the jury that the presumption of innocence is an instrument of proof created by

law in favor of one accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created.

That this presumption on the one hand, supplemented by any [131] other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

That this legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party charged with crime is entitled.

That the presumption of innocence is evidence in favor of the accused which must be borne in mind by the jury and considered by them with all of the other evidence in the case in arriving at their verdict.

That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

In charging that the presumption of innocence is merely a status created by law at the commencement of the trial.

That in failing to charge the jury that to overturn the presumption of innocence, there must be evidence of guilt carrying home a degree of conviction short only of absolute certainty.

In stating that a statement said to have been made by the defendant's wife in his absence, con-

cerning the necessity of a search-warrant authorizing the searching of the premises described in the information herein, was an admission of guilty knowledge, from which the jury might infer that the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

In stating that the evidence was such as to require the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information. [132]

That in stating that the jury had a perfect right to infer from the evidence that the defendant and Joe O'Donnell were partners in connection with the matters charged in said count of said information.

In stating that the defendant testified that he did not know anything about the search of the premises described in the information until he was told about it by the officers at the time they arrested him.

In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

In using the word "bamboozled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such

as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury and were not worthy of any credit whatsoever.

In using the word "hoodwinked" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and were not worthy of any [133] credit whatsoever.

In using the word "gulled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in

which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and were not worthy of any credit whatsoever.

In failing to state definitely the elements essential to the commission of the crime charged to have been committed in the fourth count of the information.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of the crime charged in the fourth count of the information.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt before a verdict finding the defendant guilty on the charge contained in the fourth count of the information would be justified.

In charging generally on all of the counts contained in the information herein and definitely on none.

In failing to instruct the jury:

That circumstantial evidence should be acted upon with caution.

That before a conviction can properly be had on circumstantial evidence, all the essential facts must be consistent with the hypothesis [134] of guilt as that is to be compared with all the facts proved.

That the facts must exclude every other theory but that of guilt and that the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself.

9. That the evidence is insufficient to justify the verdict of guilty on said count of said information for this:

That there is nothing in the evidence showing or tending to show to whom the property, stated in said count of the information, to be designed for the manufacture of intoxicating liquor intended for use in violation of Title II of the National Prohibition Act, belonged.

That there is nothing in the evidence tending to show that the property mentioned in said count of said information belonged to the defendant.

That there is nothing in the evidence tending to show how, when or by whom the property mentioned in said count of said information was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was ever the owner of, in possession of, or in control of said property, or that he had any knowledge concerning its existence, or the place where it was kept.

That it appears from the testimony that the room in which said property is stated to have been found had been rented to a person other than the defendant and there is nothing in the evidence tending to show that the defendant had any knowledge of, title to, or control [135] over such property.

That there is nothing in the evidence tending to show that said property had been used for the manufacture of any intoxicating liquor.

That there is nothing in the evidence tending to show that said property was ever used on the premises described in the information herein for the purpose of manufacturing any intoxicating liquor for sale, barter or any other purpose or otherwise or at all.

That there is nothing in the evidence tending to show that any intoxicating liquor had ever been sold, bartered or used for any commercial purpose in or on the premises described in the information herein or by the defendant at any time or place.

III.

That the verdict of guilty on the fifth count contained in the information on file herein on May 15,

1923, be set aside and a new trial on said count of the Information allowed on the grounds and for the reasons following:

1. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act is concerned, the charge contained in said count of said information does not state facts sufficient to constitute a public offense.

2. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act is concerned, the facts stated in said count of said information are not sufficient to show a violation of any criminal law of the United States of America.

3. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act is concerned, the fifth count of said information [136] does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act.

4. That because in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National

Prohibition Act, the same does not include any defensive negative averments or supply the want thereof by stating "that the act complained of was then and there prohibited and unlawful" as required by Section 32 of the National Prohibition Act, the above-entitled court was and is without jurisdiction to try the defendant on the charge contained in said count of said information, that he maintained a nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

5. That in so far as said count charges the maintenance of a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act is concerned, by their verdict of not guilty on the first and second counts contained in said information, the jury found the issue framed by defendant's plea of not guilty to the charge last mentioned in favor of the defendant, and the Government is now foreclosed from contending that the defendant was guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act.

6. Errors in law occurring at the trial as follows:

The Court erred in overruling defendant's objection to the testimony given by the witness Rodda relating to conversations had by him with the defendant's wife in the absence of the defendant.

The Court erred in overruling defendant's objections to the [137] testimony given by the witness Fairchild relating to conversations had by him with defendant's wife in the absence of the defendant.

The Court erred in admitting the testimony of the witness Rodda concerning statements having been made by the defendant's wife concerning the necessity for and want of a search-warrant as the basis for searching the premises mentioned and described in the information herein.

The Court erred in denying defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in making the comment that it did make in overruling defendant's motion for a directed verdict made at the conclusion of the Government's case.

The Court erred in submitting either of the charges contained in said count of said information to the jury.

7. While charging the jury, the Court erred as follows:

In its definition of a reasonable doubt.

In its statement of the law relating to the presumption of innocence.

In failing to tell the jury that the presumption of innocence is an instrument of proof created by law in favor of one accused of crime whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has thus created.

That this presumption on the one hand, supple-

mented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

That this legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party charged with crime is entitled. [138]

That the presumption of innocence is evidence in favor of the accused which must be borne in mind by the jury and considered by them with all of the other evidence in the case in arriving at their verdict.

That the jury is bound to find according to the presumption of innocence unless after considering all of the evidence in the case together with that presumption, they are satisfied beyond a reasonable doubt that the defendant is guilty as charged.

In charging that the presumption of innocence is merely a status created by law at the commencement of the trial.

That in failing to charge the jury that to overturn the presumption of innocence, there must be evidence of guilt carrying home a degree of conviction short only of absolute certainty.

In stating that a statement said to have been made by the defendant's wife in his absence, concerning the necessity of a search-warrant authorizing the searching of the premises described in the information herein, was an admission of guilty knowledge, from which the jury might infer that

the defendant knew of, participated in, and was a party to the crime charged in said count of said information.

In stating that the evidence was such as to require the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

In stating that the evidence justified the inference that the defendant was a partner with Joe O'Donnell in connection with the matters charged in said count of said information.

That in stating that the jury had a perfect right to infer from the evidence that the defendant and Joe O'Donnell were partners in connection with the matters charged in said count of said information.

In stating that the defendant testified that he did not know anything about the search of the premises described in the [139] information until he was told about it by the officers at the time they arrested him.

In arguing that because thereof the jury should view the testimony of the defendant with suspicion.

In using the word "bamboozled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the

defendant were trying to deceive and impose upon the jury and to practice trickery and deception and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive and impose upon the jury to practice trickery and deception and had been guilty of perjury and were not worthy of any credit whatsoever.

In using the word "hoodwinked" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection in which it was brought out, were such as reasonably to lead the jury to believe that in the opinion of the Court, the witnesses for the defendant were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were trying to deceive the jury as if by blinding, to blindfold the jury and to cover and conceal the true facts from the jury and had been guilty of perjury, and were not worthy of any credit whatsoever.

In using the word "gulled" in connection with its comment concerning the testimony given by the witnesses for the defendant for the reason that the way in which the word was used and the connection [140] in which it was brought out, were such as reasonably to lead the jury to believe that

in the opinion of the Court, the witnesses for the defendant were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and to cause the jury in arriving at their verdict in the case, to act upon the theory that defendant's witnesses were endeavoring to treat the members of the jury as simple, credulous persons, easily tricked, and to make them the victims of trickery and deceit practiced by defendant's witnesses upon them, and were not worthy of any credit whatsoever.

In failing to state definitely the elements essential to the commission of the crime of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt, before the defendant could be legally convicted of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act.

In failing to state definitely the element essential to the commission of the crime of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act.

In failing to state that each of these elements must be proved to the satisfaction of the jury beyond a reasonable doubt before the defendant could be legally convicted of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act. [141]

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt, before a verdict finding the defendant guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act would be justified.

In failing to state to the jury what the Government was required to prove beyond a reasonable doubt, before a verdict finding the defendant guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act would be justified.

In charging generally on all the charges contained in the information herein and definitely on none.

In submitting the charge that defendant was guilty of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act, and the charges contained in the first and second counts of said information to the jury, for the reason that as a

result thereof, defendant was twice put in jeopardy for the same offense.

In failing to instruct the jury:

That circumstantial evidence should be acted upon with caution.

That before a conviction can properly be had on circumstantial evidence, all the essential facts must be consistent with the hypothesis of guilt as that is to be compared with all the facts proved.

That the facts must exclude every other theory but that of guilt and that the facts must establish such a certainty of guilt of the accused as to convince the judgment beyond a reasonable doubt that the accused is the one who committed the offense.

In failing to instruct the jury that where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances [142] proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

In commenting as it did concerning the weight and effect to be given to the testimony of the defendant himself.

8. That the evidence is insufficient to justify a verdict of guilty on the charge that defendant maintained a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act for this:

That there is nothing in the evidence showing or tending to show to whom the liquor said to

have been found in the premises described in the information herein, belonged.

That there is nothing in the evidence tending to show that the liquor mentioned in said count of said information belonged to the defendant.

That there is nothing in the evidence tending to show how, when, or by whom the liquor mentioned in said count of said information was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was ever the owner of, in possession of, or in control of said liquor, or that he had any knowledge concerning its existence, or the place where it was kept.

That there is nothing in the evidence tending to show that if the liquor mentioned in said count of said information belonged to the defendant, he was not legally permitted to possess the same.

That unless it be conceded that the testimony given on the part of the defendant to the effect that the room in which the liquor mentioned in said count of said information was found, is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there [143] is nothing in the evidence tending to show that said liquor was not kept in defendant's private dwelling for the personal consumption of the defendant and his family residing in such dwelling and to his *bona fide* guests when entertained by him therein.

That if it be conceded that the testimony given on the part of the defendant to the effect that

the room in which the liquor mentioned in said count of said information was found is true, and that the room in which said liquor is stated to have been found, had been rented to a person other than the defendant, there is nothing in the evidence tending to show that the defendant had any knowledge of, title to, or control over such liquor.

That there is nothing in the evidence tending to show that the liquor mentioned in the fifth count of said information and stated to have been intended for use in violation of Title II of the National Prohibition Act was kept in the premises mentioned in said information for sale, barter, or any other commercial purpose.

That there is nothing in the evidence tending to show that any intoxicating liquor had ever been sold, bartered or used for any commercial purpose in or on the premises described in the information herein or by the defendant at any time or place.

9. That the evidence is insufficient to justify a verdict of guilty on the charge that defendant maintained a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act for this:

That by their verdict of not guilty on the first and second counts contained in the information herein, the jury found that no liquor had been manufactured at or within the premises mentioned

and described in the fifth count of said information.

That there is nothing in the evidence tending to show that any intoxicating liquor was ever manufactured at or within the premises mentioned and described in said count of said information. [144] That there is nothing in the evidence tending to show to whom any property contained in the premises mentioned in said count of said information which could have been used for manufacturing intoxicating liquor in violation of Title II of the National Prohibition Act belonged.

That there is nothing in the evidence tending to show that any property of any kind stated to have been used in said premises for the purpose of manufacturing intoxicating liquor in violation of Title II of the National Prohibition Act belonged to the defendant.

That there is nothing in the evidence tending to show how, when or by whom any property stated to have been found in the premises described in said count of said information which could have been used for the manufacture of intoxicating liquor in violation of Title II of the National Prohibition Act was put in the place where it is stated to have been found.

That there is nothing in the evidence tending to show that the defendant in this case was the owner of, in possession of, or in control of any property stated to have been found in the premises described in said count of said information, which could have been used for manufacturing in-

toxicating liquor in violation of Title II of the National Prohibition Act, or that he had any knowledge concerning its existence or the place where it was kept or the purpose for which it could be used.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for keeping liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be so occupied or used, such evidence is insufficient to justify the conviction of the defendant on the charge of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was kept in violation of Title II of the National Prohibition Act, as charged in the fifth count of the information herein. [145]

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for keeping liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be so occupied or used, such proof would not justify the infliction of any penalty upon or punishment of the defendant other than that the room, house or building so occupied or used should be subject to a lien for and might be sold to pay all fines and costs assessed against the person guilty of maintaining a common nuisance in said room, house or building for such violation, and that any such lien might be enforced by any court having

jurisdiction as provided in the concluding sentence of Section 21 of the National Prohibition Act.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for the manufacture of liquor contrary to any provision of Title II of the National Prohibition Act, and suffered the same to be occupied or used, such evidence is insufficient to justify the conviction of the defendant on the charge of maintaining a common nuisance, that is to say, a place and building where intoxicating liquor was manufactured in violation of Title II of the National Prohibition Act, as charged in the fifth count of the information herein.

That if the evidence proved that the defendant had knowledge or reason to believe that his room, house or building was occupied or used for the manufacture of liquor contrary to any provisoin of Title II of the National Prohibition Act, and suffered the same to be so occupied or used, such proof would not justify the infliction of any penalty upon or punishment of the defendant other than that the room, house or building so occupied or used should be subject to a lien for and might be sold to pay all fines and costs assessed against the person guilty of maintaining a common nuisance in said room, house or building for such violation, and that any such lien might be enforced by any court having jurisdiction as provided in the [146] concluding sentence of Section 21 of the National Prohibition Act.

10. That it appears from the uncontradicted testimony of the government's witnesses, Rodda and Fairchild, that the affidavit made by them and presented to the court by the United States Attorney, at the time he requested leave to file the information in the above-entitled court and cause, which affidavit is the sole basis on which the discretion of the Court to grant the request of the United States Attorney for leave to file said information is based, was false and not according to the fact in many material respects, as a result of which:

The United States Attorney was mislead;

The Court was asked to and did exercise its discretion in authorizing the filing of said information upon an entirely erroneous conception of the facts; and

The defendant was required to plead to and stand trial on an information improperly filed and without proper basis in law.

And upon the true facts appearing, the Court should have annulled its order granting leave to file the information on file in the above-entitled court and cause and dismissed the action.

11. That the statements contained in said affidavit and not shown by the testimony of the Government's witnesses, Rodda and Fairchild, to have been false, were not sufficient to justify the United States Attorney in requesting leave to file said information or to authorize the court in the exercise of its discretion, to have granted such request, as a result of which:

The United States Attorney was mislead;

The Court was asked to and did exercise its discretion in authorizing the filing of said information upon an entirely erroneous conception of the facts; and

The defendant was required to plead to and stand trial on an information improperly filed and without proper basis in law.

Each of these motions is based and will be presented on [147] the records, files and minute entries in the above-entitled court and cause, the minutes of the court therein, and a bill of exceptions to be hereafter prepared, served, settled and filed.

WHEELER & BALDWIN,
Attorneys for Defendant.

Service of the above and foregoing motion for new trial acknowledged and copy thereof received at Butte, Montana, May 17, 1923.

JOHN L. SLATTERY,
United States Attorney for the District of Montana.

Filed May 17, 1923.

That thereafter and on the day last mentioned, said motion for new trial was by order of the court, duly made and entered of record, set for hearing on May 21, 1923, at 9:30 o'clock in the morning.

That on May 21, 1923, at 9:30 o'clock in the morning said motion for new trial came duly and regularly on for hearing in open court, the defendant appearing by J. H. Baldwin, one of his attorneys, and the District Attorney being pres-

ent and appearing for the United States. Thereupon the Court stated that it did not care to hear oral arguments and permitted the defendant to file a written brief and said motion was thereupon submitted to the Court and taken under advisement.

That on May 22, 1923, herein the Court order that the defendant's motion for new trial heretofore submitted be and the same was thereupon denied, whereupon counsel for defendant asked for and was granted an exception to the ruling of the Court denying defendant's said motion for new trial.

That by orders thereafter duly made, signed, filed and entered of record in the above-entitled court and cause, the defendant herein was granted to and including June 25, 1923, in which to prepare and serve his proposed bill of exceptions on the proceedings had on the trial of the above-entitled cause and his proposed bill [148] of exceptions on the order and ruling of the Court denying his motion for new trial herein.

And now, within the time allowed by said orders, the defendant serves the above and foregoing as his proposed bill of exceptions on the proceedings had on the trial of the above-entitled cause and on the order and ruling of the court denying his motion for new trial, and asks that after due proceedings had, the same be settled, approved, allowed, signed, ordered filed, filed, and entered of record in the above-entitled court and cause as his bill of exceptions on the proceedings had on the trial

of the above-entitled cause and the order and ruling of the Court denying his motion for new trial therein.

WHEELER & BALDWIN,
Attorneys for Defendant.

Service of the above and foregoing Proposed Bill of Exceptions acknowledged and copy thereof received at Great Falls, Montana, June 18, 1923.

JOHN L. SLATTERY,
United States Attorney for the District of Montana.

Settled and allowed as true and complete, this July 6, 1923.

BOURQUIN,
J.

Filed July 6, 1923. C. R. Garlow, Clerk. [149]

And thereafter on June 20, 1923, an order enlarging the time within which to file the record and docket the case with the Clerk of the United States Circuit Court of Appeals was entered herein, which order is of record as follows, to wit:

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Order Extending Time to and Including August 30, 1923, to File Record and Docket Cause.

On motion of the defendant and plaintiff in error in the above-entitled cause and for good cause shown;

IT IS ORDERED AND THIS DOES ORDER that the time to file the record thereof and docket the case with the Clerk of the United States Court of Appeals at San Francisco, California, be and the same is hereby enlarged and said defendant and plaintiff in error is hereby granted to and including Aug. 30, 1923, to file the record thereof and docket the case with the Clerk of said Circuit Court of Appeals at San Francisco, California.

Done at Great Falls, Montana, June 20, 1923.

BOURQUIN,
Judge.

And thereafter on May 28, 1923, bond of the defendant was filed herein, which bond is entered of record as follows, to wit: [150]

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS that we, Anthony Carney, as principal and Thomas Healy and Delia Gannon as sureties, all of Butte, Montana, are held and firmly bound unto the United States of America, in the full and just sum of One Thousand Dollars ($1,000.00) good and lawful money of the United States of America, to be paid to the said United States of America, for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated at Butte, Montana, this 26th day of May, 1923.

THE CONDITION of the above obligation is such that:

WHEREAS on May 16, 1923, judgment and sentence was rendered, pronounced and entered against the defendant Anthony Carney in the above-entitled court, in the above-entitled cause, and

WHEREAS said defendant has been granted a writ of error for the purpose of having said judgment and sentence reviewed in and reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and

WHEREAS it has been ordered that such writ shall operate as a stay of proceedings under said sentence, and

WHEREAS a citation directed to the United States of America, [151] citing and admonishing

the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, thirty days from and after the date of said citation.

NOW THEREFORE if the said Anthony Carney shall prosecute his writ to effect and make his plea good and answer all damages and costs and abide the judgment of said United States Circuit Court of Appeals for the Ninth Circuit, and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the term of said Circuit Court of Appeals to which said writ of error shall be returnable, and from day to day thereafter during said term, and from term to term and from time to time until finally discharged therefrom, and shall not depart without leave of Court, and shall abide and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of said judgment and sentence against which said writ of error has been sued out, as said Court may direct, if said judgment and sentence of the said District Court against him shall be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void, otherwise to remain in full force and effect.

ANTHONY CARNEY. (Seal)
THOMAS HEALY. (Seal)
DELIA GANNON. (Seal)

United States of America,
State of Montana,
County of Silver Bow,—ss.

Thomas Healy, being first duly sworn on his oath deposes and says: that he is one of the parties named as sureties in and whose names are subscribed to the above and foregoing bond; that he is a citizen of the United [152] States, more than twenty-one years of age and a resident freeholder in Silver Bow County, Montana; that he is worth the sum of One Thousand Dollars ($1,000.00) over and above all his just debts and liabilities in property subject to execution and sale and that his property consists of lots 4 and 5, block 2, Hornet Addition to Butte, with one four room modern house and one five room modern house thereon and lots 18 and 19, block 3 of the Kenwood Addition to Butte, Montana.

THOMAS HEALY.

Subscribed and sworn to before me May ——, 1923.

[Seal] JAMES H. BALDWIN,
Notary Public for the State of Montana, Residing at Butte, Mont.

My commission expires Apr. 30, 1925.

United States of America,
State of Montana,
County of Silver Bow,—ss.

Delia Gannon, being first duly sworn on her oath deposes and says: that she is one of the parties

named as sureties in and whose names are subscribed to the above and foregoing bond; that she is a citizen of the United States, more than twenty-one years of age and a resident freeholder in Silver Bow County, Montana; that she is worth the sum of One Thousand Dollars ($1,000.00) over and above all her just debts and liabilities in property subject to execution and sale and that her property consists of the west 30 feet of lot 5, block 2, of the Original Townsite of the city of Butte, Montana, with six-room modern house thereon.

DELIA GANNON.

Subscribed and sworn to before me May 26th. 1923.

[Seal] JAMES H. BALDWIN,

Notary Public for the State of Montana, Residing at Butte, Mont.

My commission expires Apr. 30, 1925.

Filed May 28, 1923. C. R. Garlow, Clerk. [153]

And thereafter on August 17, 1923, praecipe for certified copy of record was filed herein, which praecipe is entered of record as follows, to wit:

In the District Court of the United States, District of Montana, Butte Division.

No. 921.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ANTHONY CARNEY,
Defendant and Plaintiff in Error.

Praecipe for Transcript of Record.

To John L. Slattery, Esq., United States Attorney for the District of Montana, attorney for the plaintiff and defendant in error above named, and Charles R. Garlow, Clerk of the above-entitled court:

You and each of you will please take notice that the undersigned attorneys for the defendant and plaintiff in error above named hereby serve upon you and each of you this praecipe to indicate to you the portions of the record and files of the above-entitled court and cause which defendant and plaintiff in error desires to and will incorporate in his transcript of the record on the writ of error issued herein on May 28, 1923, to have the judgment hereinbefore rendered and entered herein, reviewed by the Circuit Court of Appeals for the Ninth Circuit, and the Clerk of said District Court will incorporate and include in said transcript and certify the following:

1. The information.

2. The affidavits of Charles Rodda and Sam Fairchild, subscribed and sworn to before F. J. Dallman, Deputy Collector of Internal Revenue on May 9, 1922, and May 24, 1922, respectively, and filed in the above-entitled court and cause on May 26, 1922. [154]

3. The minute entry of May 26, 1922, showing the proceedings had at the time of the making of request for the filing of the information herein and

the order of the Court allowing the filing of said information.

4. The minute entry of May 29, 1922, showing the arraignment of the defendant on and his plea of not guilty to the charge contained in said information.

5. The verdict of the jury which was returned and filed in the above-entitled court and cause on May 15, 1923, with the filing mark endorsed thereon.

6. The minute entry of May 15, 1923, showing the receipt of said verdict and the setting of the time for passing sentence and judgment.

7. The minute entry of May 16, 1923, showing the proceedings had at the time of the passing of sentence and judgment on that day.

8. The judgment of the Court which was rendered and entered in the above-entitled court and matter on May 16, 1923.

9. The motion for new trial which was served and filed in the above-entitled court and cause on May 17, 1923, together with the admission of service attached thereto and the filing mark endorsed thereon.

10. The minute entry of May 21, 1923, showing the proceedings had in the above-entitled court and cause on that day in connection with the calling of said motion for new trial for hearing and the action taken in connection therewith.

11. The minute entry of May 22, 1923, showing the order of the Court denying the motion for new trial and granting time to sue out writ of error.

12. The petition for writ of error which was served and filed on May 28, 1923, together with the admission of service attached thereto and the filing mark endorsed thereon.

13. The assignment of errors which was served and filed on [155] May 28, 1923, together with the admission of service attached thereto and the filing mark endorsed thereon.

14. The prayer for reversal which was served and filed on May 28, 1923, together with the admission of service attached thereto and the filing mark endorsed thereon.

15. The order allowing the writ of error which was signed and filed on May 28, 1923, with the filing mark endorsed thereon.

16. The writ of error issued on May 28, 1923, with the admission of service attached thereto and the filing mark endorsed thereon.

17. The citation issued on May 28, 1923, with the admission of service attached thereto and the filing mark endorsed thereon.

18. The minute entry of May 28, 1923, showing the filing of the petition for writ of error and all of the proceedings had thereon.

19. The bill of exceptions which was signed, filed and entered of record on the 6th day of July, 1923, together with the admission of service endorsed thereon and the order settling, approving and allowing the same and the filing mark endorsed on said bill of exceptions.

20. The order of June 20, 1923, enlarging time to file record and docket case with the Clerk of

the United States Circuit Court of Appeals at San Francisco, California, to and including August 30, 1923.

21. The bond of the defendant and plaintiff in error and last copy of this praecipe.

22. Copy of this praecipe.

WHEELER & BALDWIN,

Attorneys for Defendant and Plaintiff in Error.

Service of the above and foregoing praecipe for certified transcript of record acknowledged and copy thereof received at Butte, Montana, August 17, 1923.

W. H. MEIGS,

Asst. United States Attorney for the District of Montana.

Filed August 17, 1923. C. R. Garlow, Clerk. [156]

In the District Court of the United States in and for the District of Montana.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I. C. R. Garlow, Clerk of the United States District Court in and for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 157 pages numbered consecutively from one

to 157, inclusive, is a true and correct transcript of the pleadings, process, records, orders, judgment and all other proceedings had in said cause and of the whole thereof, as appears from the original records and files of said court in my custody and control; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original citation and writ of error.

I further certify that the cost of the transcript of record is the sum of Fifty-three and 40/100 Dollars ($53.40), and that the same has been paid.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court, at Butte, Montana, this 23d day of August, A. D. 1923.

[Seal] C. R. GARLOW,
Clerk.
By L. R. Polglase,
Deputy Clerk. [157]

[Endorsed]: No. 4084. United States Circuit Court of Appeals for the Ninth Circuit. Anthony Carney, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed August 27, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the District of Montana.

No. 921.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ANTHONY CARNEY,
Defendant.

Order Extending Time to and Including August 30, 1923, to File Record and Docket Cause.

On motion of the defendant and plaintiff in error in the above-entitled cause and for good cause shown;

IT IS ORDERED AND THIS DOES ORDER that the time to file the record thereof and docket the case with the Clerk of the United States Court of Appeals at San Francisco, California, be and the same is hereby enlarged and said defendant and plaintiff in error is hereby granted to and including August 30, 1923, to file the record thereof and docket the case with the Clerk of said Circuit Court of Appeals at San Francisco, California.

Done at Great Falls, Montana, June 20, 1923.

BOURQUIN,
Judge.

[Endorsed]: No. 4084. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including August 30, 1923, to File Record and Docket Cause. Filed Jun. 26, 1923. F. D. Monckton, Clerk. Refiled Aug. 17, 1923. F. D. Monckton, Clerk.